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September 12, 2017

Clerk
Michigan Supreme Court
P. O. Box 30052
Lansing, MI 48909

Re: **People v James David Urban**
Supreme Court No. _____
Court of Appeals No. 332734
Lower Court No. 15-020176 FH

Dear Clerk:

Enclosed please find an original of the Application for Leave to Appeal for filing in the above-referenced cause.

Thank you for your attention to this matter.

Sincerely,

/s/ Peter Jon Van Hoek

Peter Jon Van Hoek
Assistant Defender

pvh
Enclosures

cc: Eaton County Prosecutor
Court of Appeals Clerk
Eaton County Circuit Court Clerk
James David Urban
File

STATE OF MICHIGAN

IN THE SUPREME COURT

PEOPLE OF THE STATE OF MICHIGAN

Plaintiff-Appellee

-vs-

JAMES DAVID URBAN

Defendant-Appellant.
_____/

Supreme Court No. _____

Court of Appeals No. 332734

Lower Court No. 15-020176 FH

EATON COUNTY PROSECUTOR
Attorney for Plaintiff-Appellee
_____

PETER JON VAN HOEK (P26615)
Attorney for Defendant-Appellant
_____

APPLICATION FOR LEAVE TO APPEAL

STATE APPELLATE DEFENDER OFFICE

BY: PETER JON VAN HOEK (P26615)
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JUDGMENT APPEALED FROM AND RELIEF SOUGHT

Defendant-Appellant James ("Jimi") Urban was convicted at a jury trial in Eaton County Circuit Court, the Hon. Janice K. Cunningham presiding, of one count of unlawful imprisonment, MCL 750.349B; one count of assault with a dangerous weapon, MCL 750.82; and one count of domestic violence, MCL 750.812. The trial took place from February 8, 2016 to February 11, 2016. On March 31, 2016, Judge Cunningham sentenced Mr. Urban to concurrent prison terms of 7 to 15 years and 2 to 4 years, and to a jail term of 93 days. Defendant appealed as of right from the convictions and sentences.

On July 18, 2017, the Court of Appeals issued an unpublished, per curiam opinion affirming the convictions and sentences. See Appendix A. That opinion was subsequently approved for publication, on request of Plaintiff-Appellee, and re-released on August 31, 2017.

The decision of the Court of Appeals is clearly erroneous and will cause manifest injustice to Mr. Urban, the appeal concerns legal principles of major importance to the state's jurisprudence, and the opinion conflicts with decisions of this Court and of other panels of the Court of Appeals. MCR 7.302 (B).

The primary issue in the case, upon which the request for publication was argued and decided, concerns whether the prosecution properly admitted evidence of an alleged DNA match to Mr. Urban in the absence of evidence of the statistical likelihood of the match. In *People v Coy*, 243 Mich App 283, 294 (2000), the Court of Appeals held that DNA profile match evidence is inadmissible absent "some accompanying interpretive evidence regarding the likelihood of the potential match," and that "some qualitative or quantitative interpretation must accompany

evidence of [a] potential [DNA] match." *Id*. at 302. The *Coy* Court went on to hold that evidence of a potential DNA match has "minimal probative value absent accompanying interpretive statistical analysis evidence." *Id.* at 303.

In the case at bar, the prosecution presented testimony from a lab scientist seeking to show that DNA found at the scene of the charged offenses on a blood-stained pillowcase matched Mr. Urban's profile. The expert who testified did not provide any statistical or empirical analysis of the probability of this match, testifying, through her report, which was admitted into evidence, only that the DNA found at the scene matched that of Mr. Urban "to a reasonable degree of scientific certainty."

In rejecting Mr. Urban's claim of plain error in the admission of this DNA evidence (there was no objection made to its admission –Mr. Urban has argued in the alternative he was denied his Sixth Amendment right to the effective assistance of counsel due to his trial attorney's failure to object to the foundation for admission of this evidence) the Court of Appeals held the report's conclusion as to the "reasonable degree of scientific certainty" satisfied the *Coy* requirement of "a qualitative or quantitative interpretation … of [a] potential [DNA] match."

This Court should grant leave to appeal to consider this question. The *Coy* foundational requirement demands more than a general statement that the alleged match was reasonably certain under scientific standards, with no further explanation or "interpretive statistical analysis." It is unlikely that any lay juror understands what a degree of scientific certainty entails without a more detailed and specific explanation. The problem the *Coy* Court found in the admission of DNA match evidence in the absence of a "qualitative or quantitative interpretation" is that jurors are unable and unqualified to understand the true meaning of the alleged match, and thus the

information provided to them would not sufficiently assist them, under MRE 702, in considering this highly technical and complex evidence. The mere statement that the results of the comparison testing met the very general and unspecific standard of scientific certainty is not really any different to a jury than their knowledge that the expert witness was qualified to render opinions as to the subject matter. Any juror would expect a qualified expert to believe his or her opinion was scientifically valid. In the absence of a detailed explanation of that degree of certainty, through statistical analysis or any comparable quantitative or qualitative explanation, a lay juror has little understanding of the probative impact of the evidence, other than merely to rely on the assurance given by the expert witness.

Given that the Court of Appeals has elected to publish this decision, the controlling authority from the *Coy* decision has now been substantially, and unwisely, diminished. This Court should grant leave to appeal, and decide, for the benefit of the bench and bar, the degree to which the *Coy* standard requires interpretive testimony from the expert witness beyond a mere or rote statement of confidence in the reliability of the alleged result.

For the reasons detailed in the attached brief in support, the erroneous admission of the DNA match evidence in this case was sufficiently prejudicial, in the context of this case, to require reversal and remand for a new trial, contrary to the Court of Appeals' dicta that any error was harmless.

Mr. Urban has raised two other issues in the case, concerning other instances of ineffective assistance of his trial counsel and the scoring of the sentencing guidelines, which are independently sufficient to warrant relief from this Court. Those issues are detailed in the attached brief.

Defendant moves this Honorable Court to either grant this application for leave to appeal or any appropriate peremptory relief.

Respectfully submitted,

STATE APPELLATE DEFENDER OFFICE

/s/ Peter Jon Van Hoek

BY: _____

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Date: September 12, 2017

APPENDIX A

STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED July 18, 2017 APPROVED FOR PUBLICATION August 31, 2017 9:05 a.m.
v JAMES DAVID URBAN, Defendant-Appellant.	No. 332734 Eaton Circuit Court LC No. 15-020176-FH

Before: MARKEY, P.J., and RONAYNE KRAUSE and BOONSTRA, JJ.

BOONSTRA, J.

Defendant appeals by right his convictions, following a jury trial, of unlawful imprisonment, MCL 750.349b, assault with a dangerous weapon, MCL 750.82, and domestic violence, MCL 750.812, as a lesser included offense of aggravated domestic violence, MCL 750.81a(2). Defendant was acquitted of an additional assault with a dangerous weapon charge and possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b. The trial court sentenced defendant to concurrent prison terms of 7 to 15 years' for the unlawful imprisonment conviction, 2 to 4 years for the assault with a dangerous weapon conviction, and 93 days for the domestic violence conviction. We affirm.

I. PERTINENT FACTS AND PROCEDURAL HISTORY

Defendant's convictions relate to his extended confinement and assault of his girlfriend, MH, in his home. During the period of confinement, defendant choked and kicked MH, attempted to force her to drink alcohol, threatened to rape and kill her, hit her with a handgun and liquor bottle, and held the handgun to her face and chest, and in her mouth. MH testified that defendant was armed with both a handgun and a sawed-off shotgun during the incident. She further testified that defendant forced her to unload and reload the magazine of the handgun several times. At some point, defendant tripped while taking off his pants and underwear, and MH was able to grab the handgun and escape to a neighbor's house to call the police. Eaton County Sheriff Deputies arrested defendant and recovered a loaded handgun, but could not locate a shotgun.

At trial, a forensic scientist testified that DNA taken from saliva found on the handgun contained a mix of donors and could not be conclusively matched. However, DNA taken from blood on a tank top and from blood on a door in defendant's home matched that of MH, and DNA taken from a blood-stained pillowcase matched that of defendant. MH testified that, at times during the incident, defendant spoke in Arabic and made statements relating to the Islamic religion. Defendant argued that MH was exaggerating, and described the incident as a "brawl" between defendant and MH that had resulted in injuries to both parties. Outside the view of the jury, defense counsel had MH load the magazine of the handgun that had been found in defendant's home. The trial court instructed the jury that the victim had demonstrated that she had the physical strength to load the magazine of the handgun.

The jury convicted defendant as described. At sentencing, the trial court scored offense variables (OVs) 4 (psychological injury to the victim) and 7 (aggravated physical abuse) at 10 and 50 points respectively. This appeal followed.

II. ADMISSION OF DNA EVIDENCE

Defendant argues on appeal that the trial court improperly admitted DNA evidence because the prosecution failed to present the required statistical analysis. We disagree. Defendant did not object to the admission of this evidence at trial; we therefore review defendant's challenge to its admission for plain error affecting substantial rights. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999). Reversal is warranted only if the plain error resulted in the conviction of an innocent defendant or if "the error seriously affected the fairness, integrity, or public reputation of judicial proceedings independent of the defendant's innocence." *Id*.

In *People v Coy*, 243 Mich App 283, 294; 620 NW2d 888 (2000), this Court concluded that evidence of a potential match between a subject's DNA sample and DNA found on evidence was "inadmissible absent some accompanying interpretive evidence regarding the likelihood of the potential match." That is, "some qualitative or quantitative interpretation must accompany evidence of [a] potential [DNA] match." *Id*. at 302. The Court reasoned that the scientific evidence of a possible DNA match between a defendant and DNA found on evidence would not assist the jury, consistent with MRE 702, without "some analytic or interpretive evidence concerning the likelihood or significance of a DNA profile match." *Id*. at 301.[1] Alternatively, the Court held that evidence of a potential DNA match had "minimal probative value absent accompanying interpretive statistical analysis evidence," and should be excluded, in accordance

[1] MRE 702 states, "If the court determines that recognized scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training or education, may testify thereto in the form of an opinion or otherwise."

with MRE 403, when weighed against the danger of unfair prejudice emanating from the jury giving the DNA evidence undue weight. *Id*. at 303.[2]

In this case, a forensic scientist testified that the DNA profiles on the tank top, MH's leggings, and the bedroom door matched MH's DNA profile, with defendant being excluded as the donor, and that the DNA profile on a pillowcase matched defendant's DNA, with MH being excluded as a donor. The witness was not asked at trial to provide any empirical data to define the statistical parameters of a DNA "match." However, her report was admitted into evidence, and it contained the testing methodology used, as well as her conclusions and interpretations of the data. Following each conclusion, and for each item indicating a match with the DNA of either defendant or MH, the report contained language stating that "in the absence of identical twins or close relatives, it can be concluded to a reasonable degree of scientific certainty that the DNA profile of the major donor to item [number and description of item tested] and from [number and description corresponding to either defendant or MH] is from the same individual."

We conclude that the scientist's report constitutes "some analytic or interpretive evidence concerning the likelihood or significance of a DNA profile match." *Coy*, 243 Mich App at 301-302. Unlike the expert witness in *Coy*, who explicitly testified that no statistical interpretation was performed on the samples in question, *id*. at 294, the scientist's report in this case indicates that she analyzed and interpreted the samples that were suitable for analysis and concluded "to a reasonable degree of scientific certainty" that they matched samples taken from defendant and the victim. We are satisfied that there was no plain error in the admission of this evidence. *Carines*, 460 Mich at 763.

Further, even if the evidence was admitted in error, the admission did not affect defendant's substantial rights. MH described a three-and-a-half- to four-hour episode during which defendant confined her in his house with a handgun and a sawed off shotgun while assaulting her with his hands and feet, a liquor bottle, and a handgun. She told a doctor that she had been struck in the head by a firearm and had been hit on other parts of her body, and she had injuries consistent with that description of the incident. An officer photographed MH's injuries. The same officer photographed defendant, who had a bruise on his arm and scratches on his neck, left elbow, and right wrist. Officers searched defendant's home and found a handgun, which MH identified, as well as an empty liquor bottle, a blood-stained tank top, a blood-stained pillowcase, blood on the door, pictures of MH's children, and MH's phone, purse, and car keys.

The evidence against defendant was therefore substantial, even apart from the DNA evidence. The DNA evidence merely established that MH's blood was found on items recovered from the bedroom, and it therefore served as some corroboration of her testimony. However, even under defendant's theory of the case, there was a "brawl" that resulted in injuries to both parties. And the fact that DNA from saliva on the handgun barrel was inconclusive was arguably supportive of defendant's claim that the handgun was not involved in the incident. For all of

[2] Relevant evidence may be excluded if its "probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury." MRE 403.

these reasons, defendant has not established that the admission of the DNA evidence, even if erroneous, affected his substantial rights and requires reversal. *Carines*, 460 Mich at 763.

III. INEFFECTIVE ASSISTANCE OF COUNSEL

Defendant also argues that his trial counsel provided ineffective assistance in several ways. We disagree. Because defendant did not move the trial court for a new trial or evidentiary hearing regarding his counsel's effectiveness, our review is limited to errors apparent on the record. *People v Unger* (*On Remand*), 278 Mich App 210, 253; 749 NW2d 272 (2008). A claim of ineffective assistance of counsel is a mixed question of fact and law. *Id*. at 242. We review the trial court's factual findings for clear error, but we review de novo the constitutional question of whether an attorney's ineffective assistance deprived a defendant of his right to counsel. *Id*.

A defendant's right to counsel is guaranteed by the United States and Michigan Constitutions. US Const, Am VI; Const 1963 art 1, § 20. This "right to counsel encompasses the right to the effective assistance of counsel." *People v Cline*, 276 Mich App 634, 637; 741 NW2d 563 (2007). In order to demonstrate ineffective assistance of counsel, a defendant must show (1) "that counsel's performance was deficient" and (2) "that counsel's deficient performance prejudiced the defense." *People v Taylor*, 275 Mich App 177, 186; 737 NW2d 790 (2007). A counsel's performance is deficient if "it fell below an objective standard of professional reasonableness." *People v Jordan*, 275 Mich App 659, 667; 739 NW2d 706 (2007). The "effective assistance of counsel is presumed, and the defendant bears a heavy burden of proving otherwise." *People v Rodgers*, 248 Mich App 702, 714; 645 NW2d 294 (2001). Deficient performance prejudices the defense if it is reasonably probable that, but for counsel's error, "the result of the proceeding would have been different." *Jordan*, 275 Mich App at 667.

Defendant argues that his trial counsel provided ineffective assistance by failing to object to admission of the DNA evidence. Defense counsel's decisions are presumed to be sound trial strategy, *Taylor*, 275 Mich App at 186, and we will not substitute our judgment of that strategy with the benefit of hindsight. *People v Matuszak*, 263 Mich App 42, 58; 687 NW2d 342 (2004).

In this case, it is likely that defendant's trial counsel did not think it necessary to dispel the notion that his or MH's DNA was found on the items in defendant's home. Defendant did not deny that an altercation with MH had occurred, and he conceded that she (as well as he) had sustained injuries. The presence of their respective DNA on items found in the home would therefore be unsurprising, and the purpose of challenging the evidence establishing the presence of the DNA would therefore seem to be questionable. Instead, defense counsel argued that defendant had not held the victim captive or assaulted her with the firearms or liquor bottle, and that defendant had consequently been overcharged. Further, defendant was able to argue from the DNA evidence that the DNA testing on saliva found on the barrel of the handgun was inconclusive, supporting his defense. Therefore, it may well have been a strategic decision for counsel not to challenge the admission of the DNA evidence. We conclude that counsel's actions were within an objective standard of professional reasonableness. *Jordan*, 275 Mich App at 667. Further, the admission of the DNA evidence did not prejudice defendant because it in essence established that both MH and defendant were injured in the home, which was consistent with defendant's "brawl" theory. Accordingly, even if defense counsel had objected to the admission of the DNA evidence and successfully argued for its exclusion, there is no reasonable probability that the result of the trial would have been different. *Jordan*, 275 Mich App at 667.

Defendant further argues that his trial counsel provided ineffective assistance because he elicited testimony from MH about defendant's possession of an illegal sawed-off shotgun. However, MH had already testified during direct examination that defendant was holding a handgun and shotgun when he entered her room and told her that she could not leave. MH testified that she was familiar with the shotgun because defendant had previously sent her a text message indicating that he was going to shoot himself, and he had attached a picture, which was admitted, showing him holding the shotgun to his chin. MH was asked during direct examination to describe the shotgun, and she recalled that it had been altered by being sawed off and painted with markings and glow-in-the-dark paint. She also stated that defendant had displayed the shotgun during one of their romantic encounters a couple of weeks before the incident and that she had taken a video of the previous encounter with her phone; the video was played for the jury.

Nonetheless, defense counsel did elicit that possessing this firearm was "illegal" and that defendant had told her that possessing it was illegal. This elicitation may well have been strategic. Counsel sought to show that MH was familiar with a unique shotgun, and that she knew it had been in the house. Defense counsel argued that the shotgun was not in the home at the time of the assault, but that MH had reported that it was there based on her having previously seen it in the home. Establishing that the shotgun was illegal may have supported defendant's theory that MH wanted to get defendant in as much legal trouble as possible by fabricating a story involving an illegal weapon. And defense counsel repeatedly emphasized that the shotgun was not found in the house. This strategy may have been partially successful, inasmuch as the jury found defendant not guilty of a second count of assault with a dangerous weapon (handgun or shotgun) and of felony-firearm, which suggests that the jury may not have believed beyond a reasonable doubt that defendant possessed the shotgun at the time of the incident. Further, since the video showing defendant with the shotgun had already been played, defense counsel may have simply tried to "get ahead" of the issue of whether defendant's possession of such a weapon was illegal, rather than leaving the jury to speculate in ways that may have prejudiced his client. A common defense tactic is to acknowledge incriminating evidence that was strongly supported while denying other elements of the crime. *People v Wise*, 134 Mich App 82, 97-99; 351 NW2d 255 (1984). We conclude that defendant has not demonstrated that his trial counsel's elicitation of testimony regarding the shotgun fell below an objective standard of professional reasonableness or that defendant was prejudiced by the questions posed. *Jordan*, 275 Mich App at 667.

Next, defendant argues that his trial counsel was ineffective in failing to object to the prosecution's questions concerning his religious beliefs. We disagree. MH testified that during the incident defendant said Islamic prayers and "Muslim things" in Arabic; she also stated that she "hated the fact that he felt he was a bad person" and "the fact that [Muslims had] made him this way." Defendant argues that this testimony was irrelevant and prejudicial.

"Generally, all relevant evidence is admissible at trial." MRE 402; *People v Aldrich*, 246 Mich App 101, 114; 631 NW2d 67 (2001). Evidence is relevant if it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." MRE 401. "Under this broad definition," evidence that is useful in shedding light on any material point is admissible. *Aldrich*, 246 Mich App at 114. The "relationship of the elements of the charge, the theories of

admissibility, and the defenses asserted govern." *People v Yost*, 278 Mich App 341, 403; 749 NW2d 753 (2008).

Much of the testimony regarding defendant's religion was relevant to demonstrate his state of mind as observed by MH during the time that he was alleged to have unlawfully confined her. MH testified that defendant was becoming more emotional and upset as they spoke about personal matters. The prosecution's theory of the case was that defendant committed the crimes because he had become upset at recent losses in his life; MH'S testimony reflects defendant's emotional turmoil. MH also testified that she was afraid that defendant's mental state was worsening and that she was in danger of being more severely hurt or killed if she did not attempt to flee.

The testimony was also not unfairly prejudicial. Relevant evidence may be excluded if its "probative value is substantially outweighed by the danger of unfair prejudice." MRE 403; *Aldrich*, 246 Mich App at 114. "All relevant evidence is prejudicial; it is only unfairly prejudicial evidence that should be excluded." *People v McGhee*, 268 Mich App 600, 613-614; 709 NW2d 595 (2005). "Unfair prejudice may exist where there is a danger that the evidence will be given undue or preemptive weight by the jury or where it would be inequitable to allow use of the evidence." *People v Gipson*, 287 Mich App 261, 263; 787 NW2d 126. Evidence that is unfairly prejudicial goes beyond the merits of the case to inject issues broader than the defendant's guilt or innocence, like the "jury's bias, sympathy, anger, or shock." *McGhee*, 268 Mich App at 614.

Defendant argues that the jury could have been inflamed by references to the Islamic religion. However, evidence that defendant engaged in prayer and religious practices and was severely emotionally distressed during the commission of the crime was unlikely to inflame the jury to the extent that they could not evaluate the case based on the evidence presented. *McGhee*, 268 Mich App at 614.

Relatedly, defendant argues that defense counsel was ineffective for failing to object to the prosecution's questions concerning defendant's religious statements on the grounds that they were intended to inflame the jury. We disagree. The test for prosecutorial misconduct[3] is "whether a defendant was denied a fair and impartial trial." *People v Dobek*, 274 Mich App 58, 63; 732 NW2d 546, lv den 480 Mich 897 (2007). A fair trial for a defendant "can be jeopardized when the prosecutor interjects issues broader than the guilt or innocence of the accused." *Id*. at 63-64. Prosecutorial comments must be read as a whole and evaluated in context, including the

[3] We have discussed the difference between "prosecutorial error" and "prosecutorial misconduct." *People v Cooper*, 309 Mich App 74, 87–88; 867 NW2d 452 (2015). Here, defendant's argument that the prosecution deliberately and repeatedly sought to inflame the jury with religious prejudice would appear to be fairly characterized as a claim for prosecutorial misconduct, rather than the "technical or inadvertent" errors that are "more fairly presented as claims of prosecutorial error." *Id*.; see also MRPC 8.4. Nonetheless, regardless of "what operative phrase is used," we must look to see whether the prosecution "committed errors during the course of trial that deprived defendant of a fair and impartial trial." *Id*. (citation omitted).

arguments of the defense and the relationship they bear to the evidence. *People v Thomas*, 260 Mich App 450, 454; 678 NW2d 631 (2004).

Here, the prosecution asked MH questions regarding what actions and statements defendant was making as he kept her confined. Most of the statements referring to defendant's religion were relevant and reflected factual descriptions of her continued confinement. It does not appear from the record that the prosecution sought to insert religion into the case in order to arouse possible prejudice in the jury, but rather as a factual description of the events. Therefore, an objection by defendant's trial counsel on the grounds of prosecutorial misconduct would have been futile. *Dobek*, 274 Mich App at 63. Counsel was not ineffective for failing to make a futile objection. *In re Archer*, 277 Mich App 71, 84; 744 NW2d 1 (2007).

Next, defendant argues that his trial counsel should have objected to the trial court's instructions to the jury following the demonstration of MH loading ammunition into the magazine of the handgun. The trial court instructed the jury that defense counsel had requested a demonstration of MH loading the handgun's ammunition magazine with eight bullets outside the presence of the jury. The trial court instructed that she had demonstrated "the physical strength to load the ammunition into the magazine," and that "she was able to put the rounds into the magazine."

However, during the demonstration, MH initially appeared to struggle to load the magazine and only had success after defendant's trial counsel informed her that she had been loading the ammunition backwards. Defendant therefore argues that defense counsel should have objected to the instruction and requested that the trial court include a statement that MH had required assistance to load the magazine. We disagree. Defense counsel's theory was that, contrary to MH's testimony, she lacked the strength to load the magazine of the handgun found in defendant's home. Because defense counsel requested the demonstration expressly for the purpose of demonstrating whether MH had the strength to load the magazine, the trial court's instruction to the jury regarding the demonstration was accurate. Even if MH did require a brief verbal prompt while attempting to load a magazine in front of a trial judge and multiple officers of the court, she demonstrated that she had the strength to load the magazine. And the fact that she required such a prompt was not dispositive of whether she had previously loaded the magazine. Given these circumstances, it is doubtful that an objection to the trial court's instruction regarding the demonstration would have been successful. Trial counsel is not required to make futile objections. *Archer*, 277 Mich App at 84. And even if successful, it is doubtful the exclusion of this evidence would have resulted in a different outcome; defendant has thus not demonstrated he was prejudiced by his counsel's lack of objection. *Jordan*, 275 Mich App at 667.

Defendant also argues that his trial counsel failed to object to testimony characterizing the state of defendant's home. Defendant's mother testified that she had previously observed that his home was "a mess," with dog hair on everything, and a detective described the home on the day of the incident as having "a really bad odor," with some broken doors, holes in some walls, and some things painted on the wall. A photograph of two obscene words painted on the master bedroom wall was admitted.

Defendant argues that this evidence was irrelevant. However, defense counsel had objected previously to the relevance of similar testimony from MH. The trial court had allowed

the testimony after plaintiff argued that it was relevant to demonstrate the theory that defendant had been losing control of his emotional state and to show his activities immediately preceding the crimes. Any objection to similar testimony from defendant's mother and the detective likely would have been similarly unsuccessful because it was also relevant to the prosecution's theory that defendant's deteriorating emotional state, as evidenced by his neglecting and defacing of his home, contributed to his commission of the charged crimes. Counsel was not ineffective for failing to make a futile objection. *Archer*, 277 Mich App at 84.

IV. SENTENCING

Finally, defendant argues that the trial court erroneously scored OVs 4 and 7. We disagree. "Whether the facts, as found, are adequate to satisfy the scoring conditions prescribed by statute, i.e., the application of the facts to the law, is a question of statutory interpretation, which an appellate court reviews de novo." *Id*. See also *People v Calloway*, ___ Mich ___; ___ NW2d ___ (May 19, 2017). We review for clear error the trial court's factual determinations at sentencing. *People v Hardy*, 494 Mich 430, 438; 835 NW2d 340 (2013).

The trial court must consult the advisory sentencing guidelines and assess the highest amount of possible points for all offense variables. *People v Lockridge*, 498 Mich 358, 392 n 28; 870 NW2d 502 (2015). The trial court's determinations must be supported by a preponderance of the evidence. *People v Osantowski*, 481 Mich 103, 111; 748 NW2d 799 (2008).

Defendant argues that OV 4 was erroneously scored at 10 points because there was no demonstrated serious psychological injury to MH. OV 4 provides for a "[s]core [of] 10 points if the serious psychological injury may require professional treatment," and "the fact that treatment has not been sought is not conclusive." MCL 777.34(2). OV 4 is scored at zero points when "[n]o serious psychological injury requiring professional treatment occurred to a victim[.]" MCL 777.34(1)(b). Here, defendant argues that the trial court improperly scored OV 4 at 10 points based on the nature of the crime, rather than on evidence of serious psychological injury. See *People v Lockett*, 295 Mich App 165, 183; 814 NW2d 295 (2012) ("The trial court may not simply assume that someone in the victim's position would have suffered psychological harm"). However, the trial court in fact scored OV 4 at 10 points based on MH's fear that she was going to die, on the fact (elicited at trial) that she wanted to look at pictures of her children as she died, and on "all of the things that happened that [the court] heard firsthand from her and observed firsthand in the courtroom." The trial court also found that MH's victim impact statement confirmed the psychological injury. The victim impact statement indicated that MH had been seeing a therapist through a domestic violence shelter because she was feeling unlovable and disgusting because of the abuse she had endured. She also mentioned nightmares and flashbacks to the day "he decided to take my life," and a daily struggle with emotional stability as a result of the trauma. At trial, MH testified that she cried for the three and a half hours that she was confined in the room at gunpoint, and that she thought she was going to die. Further, a neighbor described MH as shaking and crying after she escaped from defendant, a detective stated that she was upset to the extent that she had difficulty communicating, the emergency room physician said that she was upset, and another officer stated that he tried to calm her down while she was crying. Ample evidence supported the trial court's scoring of OV 4.

OV 7, MCL 777.37, aggravated physical abuse, is scored at 50 points if "[a] victim was treated with sadism, torture, or excessive brutality or conduct designed to substantially increase

the fear and anxiety a victim suffered during the offense." It is scored at zero points where there was no victim treated in the manner described. The trial court found that defendant had engaged in sadism[4] or egregious conduct designed to cause additional pain, grief, and anxiety. To support the scoring, the trial court referred to defendant's use of guns and his continuous threats to rape and kill MH, causing fear and anxiety that were beyond the elements of defendant's crimes. In determining the scoring of OV 7, the trial court should "determine whether the defendant engaged in conduct beyond the minimum necessary to commit the crime, and whether it is more probable than not that such conduct was intended to make the victim's fear or anxiety increase by a considerable amount." *Hardy*, 494 Mich at 443. Defendant argues that his conduct was not sufficiently egregious to justify a score of 50 points and that MH's conduct demonstrates this because she did not find his threats to be credible. While MH initially may not have believed defendant's threats, the record is clear that by the time she made her escape she was convinced that defendant was serious and that her life was at risk. More importantly, OV 7 is scored based on defendant's conduct and his intent, not whether the victim felt sufficiently threatened. See MCL 777.37.

Defendant was convicted of assaulting MH, unlawfully imprisoning her, and misdemeanor domestic violence. A conviction for unlawful imprisonment requires that "(1) a defendant must knowingly restrain a person, and (2) the restrained person must be secretly confined." *People v Railer*, 288 Mich App 213, 217; 792 NW2d 776 (2010). "The elements of felonious assault are (1) an assault, (2) with a dangerous weapon, and (3) with the intent to injure or place the victim in reasonable apprehension of an immediate battery." *People v Chambers*, 277 Mich App 1, 8; 742 NW2d 610 (2007).

The record contains substantial evidence supporting the conclusion that defendant's prolonged behavior, which appeared to be designed to keep MH captive emotionally as well as physically, and that was beyond the bounds of his crimes, was egregious and sadistic. MH stated that he confined her for three-and-a-half to four hours, threatened her with guns, and assaulted her with his hands and feet, a liquor bottle, and a handgun. He choked and kicked her, and then left the room to retrieve his two guns. She stated that he told her that she could not leave and that he was going to drink liquor and smoke cigarettes before he killed them both. She reported that defendant threatened to rape her, told her that she should have believed the stories he had told her of bad things he had done to other women, and struck her while she was in the fetal position and not responsive to him. Defendant did not allow MH to stand and would point the gun at her head when she resisted, and he made her repeatedly load the gun, telling her that he wanted the bullet that killed him to have her fingerprints. Defendant also forced MH to put the gun in her mouth. Ample evidence supported the trial court's scoring of OV 7.

[4] Sadism means conduct that "subjects the victim to extreme or prolonged pain or humiliation and is inflicted to produce suffering or for the offender's gratification." MCL 777.37(3).

Affirmed.

/s/ Mark T. Boonstra
/s/ Jane E. Markey
/s/ Amy Ronayne Krause

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STATEMENT OF JURISDICTION

Defendant-Appellant was convicted in the Eaton County Circuit Court by jury trial, and a Judgment of Sentence was entered on March 31, 2016. A Claim of Appeal was filed on April 27, 2016, by the trial court pursuant to the indigent defendant's request for the appointment of appellate counsel dated April 6, 2016, as authorized by MCR 6.425(F)(3). This Court has jurisdiction in this appeal as of right provided for by Mich Const 1963, art 1, §20, pursuant to MCL 600.308(1); MCL 770.3; MCR 7.203(A), MCR 7.204(A)(2).

STATEMENT OF QUESTIONS PRESENTED

I. DID THE TRIAL COURT'S ADMISSION OF DNA EVIDENCE FOR WHICH THE STATE FAILED TO PROVIDE ANY STATISTICAL INTERPRETATION CONSTITUTE A CLEAR ERROR—OR, AT A MINIMUM, DID DEFENSE COUNSEL'S FAILURE TO OBJECT CONSTITUTE INEFFECTIVE ASSISTANCE OF COUNSEL—THAT RESULTED IN PREJUDICE AND WARRANTS THE GRANT OF A NEW TRIAL?

Trial Court made no answer.
Defendant-Appellant answers, "Yes".

II. DOES THE INEFFECTIVE ASSISTANCE OF DEFENSE COUNSEL WARRANT THE GRANT OF A NEW TRIAL?

Trial Court made no answer.
Defendant-Appellant answers, "Yes".

III. DOES THE SENTENCING COURT'S ABUSE OF DISCRETION IN INACCURATELY SCORING THE SENTENCING GUIDELINES AND INCREASING THE ATTENDANT RANGE WARRANT THE GRANT OF A NEW SENTENCING HEARING?

Trial Court answers, "No".
Defendant-Appellant answers, "Yes".

STATEMENT OF FACTS

Defendant-Appellant James ("Jimi") Urban was convicted at a jury trial in Eaton County Circuit Court, the Hon. Janice K. Cunningham presiding, of one count of unlawful imprisonment, MCL 750.349B; one count of assault with a dangerous weapon, MCL 750.82; and one count of domestic violence, MCL 750.812. The trial took place from February 8, 2016 to February 11, 2016. On March 31, 2016, Judge Cunningham sentenced Mr. Urban to concurrent prison terms of 7 to 15 years and 2 to 4 years, and to a jail term of 93 days. He now appeals as of right.

Mr. Urban was a father and self-made businessman in Delta Township: he raised three children, R2 155, and he owned a small plumbing company, R1 134.[1] Following an altercation with his then-girlfriend, Monica Hammond, R1 135, Mr. Urban was arrested on May 28, 2015. He was charged with five counts of criminal activity: (1) unlawful imprisonment; (2)–(3) assault with a dangerous weapon (two counts); (4) felony firearm; and (5) aggravated domestic violence.

Mr. Urban's trial began on February 8, 2016. R1 4. After jury selection and opening statements, the State called Ms. Hammond as its first witness. R1 132. Ms. Hammond identified Mr. Urban and testified that they began dating in January 2015, getting along "really good." R1 133. She explained, however, that Mr. Urban started to face "a lot of stressful stuff," which strained the relationship—his plumbing business was suffering, he was facing foreclosure, and he had lost custody of his children. R1 134. Ms. Hammond testified that from mid-April through May, she and Mr. Urban began to argue frequently. R1 135. When asked about the week leading up to the altercation, Ms. Hammond initially maintained she was "sure" she only stayed

[1] Note: Citations to the Presentence Investigation Report are designated as "PSR" followed by the page number. The transcript of the sentencing hearing is cited as "S" followed by the page number. Citations to the transcript of the trial carry the following designations, followed by the page number: R1 (2/8/16); R2 (2/9/16); R3 (2/10/16); R4 (2/11/16); and R5 (2/12/16).

overnight with Mr. Urban the night of Wednesday, May 27, 2015. R1 135–136. When pressed, however, she recalled she had also stayed over on Tuesday, May 26, the previous night. R1 136.

The prosecutor asked Ms. Hammond to describe Mr. Urban's home on that Tuesday, and Ms. Hammond said that the walls were painted with profanities. R1 136–137. Defense counsel objected on the basis of relevance, arguing "people pain [sic] their walls all the time," but the court allowed Ms. Hammond to proceed. R1 136–137. While she admitted she had just arrived at the home, Ms. Hammond attributed the painted profanities—"fuck" and "shit"—to Mr. Urban, testifying to her conclusion that "Jimi had painted things on the walls." R1 136–137.

The prosecutor then asked Ms. Hammond to recount her day with Mr. Urban on Wednesday, May 27. R1 137. While Mr. Urban spent the day tending to clients, Ms. Hammond sat in his van and looked at apartments. R1 137–138. Ms. Hammond described herself as "in between" places, R1 138—accordingly, Mr. Urban allowed her to stay overnight frequently, R1 133–134, recognizing that Ms. Hammond "didn't really have a place to go," R1 143. At the end of the work day, Mr. Urban and Ms. Hammond went to Walmart and purchased a bottle of Captain Morgan spiced rum. R1 139. When Ms. Hammond expressed her desire to drive to her mother's house in Eaton Rapids to "use her [mother's] WiFi," Mr. Urban complied, even though he wanted to go home. R1 139–140. Ms. Hammond claimed that during the time spent at her mother's house, Mr. Urban consumed over half of the bottle of rum. R1 140–141. She said she and Mr. Urban had discussed staying at her mother's house, but Mr. Urban ultimately decided to go home—he had jobs lined up the next day, and he needed to let his dogs out and take a shower. R1 141. Ms. Hammond agreed to drive Mr. Urban home, and, when they arrived, she decided to stay overnight. R1 142.

Ms. Hammond testified that when they got inside, she wanted to go to sleep. R1 142. Instead, however, she stayed up and argued with Mr. Urban, texting from an upstairs bedroom that she had "kinda . . . claimed . . . as [her] own" by "mov[ing] [her] stuff . . . into [it]." R1 142–143. Ms. Hammond explained that when she stayed in that room, she and Mr. Urban typically slept in the bed together. R1 143. Ms. Hammond testified that on the night in question she fell asleep texting Mr. Urban, woke up to find him sleeping next to her, and then went back to sleep. R1 145–146. When she woke up the next morning, she realized he had moved, and she went to look for him. R1 146. Ms. Hammond found Mr. Urban in his own room, and when he did not engage with her, she went downstairs, sat in his recliner, and smoked a cigarette. R1 147. Ms. Hammond ackknowledged she was "annoyed" that Mr. Urban left to sleep in his own room, and then went upstairs to get dressed and return to her mother's. R1 147. She testified Mr. Urban followed her into the bedroom, continued to drink the bottle of rum, told her she could not leave, and became physical with her, breaking a mirror with the bottle. R1 147–151.

Ms. Hammond claimed that, among other things, Mr. Urban "would hit [her] with the bottle [of Captain Morgan]," R1 149, kicked her and caused her to cough up "phlegm," R1 152, and retrieved "a handgun and a shotgun," R1 153, which she described as altered, R1 157. On cross-examination, defense counsel solicited Ms. Hammond's confirmation that Mr. Urban had a "semi-automatic handgun and . . . sawed-off shotgun." R1 222. He then asked whether Ms. Hammond knew that the shotgun was "unlawful for [Mr. Urban] to possess." R1 228. When she said that she did, defense counsel asked, "He told you that, didn't he?" R1 228. Once again, Ms. Hammond responded in the affirmative. R1 228.

Ms. Hammond asserted Mr. Urban threatened to kill both of them, he repeatedly kicked her, punched her, and hit her with the bottle of rum on her "legs," "shoulders," "arms," and

"head." R1 165. Ms. Hammond claimed Mr. Urban struck her across the back of the head with the handgun, opening a "gash" in the back of her head, and forced the handgun into her mouth. R1 166–67. Ms. Hammond testified she held Mr. Urban's shirt to the back of her head. R1 174. She also claimed that Mr. Urban forced her to reload the handgun's magazine "three or four" times. R1 171.

Ms. Hammond described herself as "angry," R1 166, and said she would get mad and challenge Mr. Urban's alleged directions, R1 170–71. Ms. Hammond estimated she and Mr. Urban were in the bedroom for approximately four hours, leaving only to use the bathroom. R1 167. On one trip to the bathroom, she testified Mr. Urban became emotional and began to cry. R1 177. Ms. Hammond said that he began "saying . . . Muslim things," including "a lot of . . . things in Arabic" and "some prayers." R1 178. At the State's prompting, she described how Mr. Urban used to practice Islam with his former wife, a Muslim woman. R1 178. Ms. Hammond testified she told Mr. Urban she "hated Muslims." R1 178.

Upon returning from that trip to the bathroom, Ms. Hammond claimed she grabbed a picture of her children, which Mr. Urban took from her and threw aside. R1 179–81. She alleged he continued to threaten her and drink from the bottle of Captain Morgan, making her drink with him. R1 182–83. While Ms. Hammond alleged Mr. Urban threatened to kill her and himself once he had finished the Captain Morgan and cigarettes, she admitted she "urge[d] him to hurry up and drink it." R1 183–84. She testified that, in actuality, she was "over it" and believed that, if Mr. Urban finished the bottle, he might just "want to go to the store and get another one." R1 184.

Ms. Hammond testified that with the handgun and bottle in his hand, Mr. Urban took off his pants and underwear. R1 186. She claimed he got "tangled" in his clothes, stumbled, and

placed the handgun down, at which point she grabbed it, left the house, and threw the loaded gun across the front porch. R1 186–87. She went to a neighbor's house, where the neighbor offered her a cigarette. R1 190. Ms. Hammond asked to go to the police station, and the neighbor drove her there. R1 190. When called by the prosecution to testify, R1 252–54, the neighbor (Sarah Mida) confirmed she drove Ms. Hammond to the police station, R1 257. Ms. Hammond testified she arrived at the police station with blood "all over" her, and was interviewed by police. R1 190. Ms. Hammond then went to Sparrow Hospital and spoke with Detective Richard Buxton, another police officer. R1 191.

During her cross-examination, Ms. Hammond acknowledged a number of falsehoods: she admitted she led Detective Buxton and the police to believe Mr. Urban had rigged his home with "bombs" and "boob-traps." R1 197–98. She also conceded that at both the police station and hospital she lied to the interviewing officers, pretending that she had not consumed any alcohol. R1 202. It was only after the hospital produced a toxicology report that Ms. Hammond changed her story. R1 202. Ms. Hammond also acknowledged she was never admitted to the hospital for the alleged "gash" on her head—instead, the hospital sent her home and told her to take a pain reliever. R1 236–37.

Towards the end of the trial, defense counsel sought to have Ms. Hammond demonstrate that she could load bullets into the magazine of the handgun. R3 217. Defense counsel had previously asked Ms. Hammond about going to the shooting range with Mr. Urban and her ability to load rounds of bullets into the magazine. R1 219–21. Ms. Hammond had testified she would be able to load the magazine, R1 221, which was inconsistent with a stipulation submitted to the court in which "she admitted she couldn't do it," R1 290. Defense counsel reiterated "the issue [was] strength." R3 221. When defense counsel reintroduced the issue, the court allowed

the demonstration to take place outside of the presence of the jury. R3 222. When defense counsel called Ms. Hammond back to the stand, she initially loaded the magazine into the handgun backwards. R3 223–25. When told that she had done it improperly, she was allowed an opportunity to try again, and was then able to load it correctly. R3 225–26. The court elected to instruct the jury simply that "the victim demonstrated that she could, in fact, load the right rounds of ammunition into the magazine." R3 227. Defense counsel made no objection to this instruction. R3 227. The jury was admitted back into the courtroom with the instruction that, at the defense's request, Ms. Hammond showed that she "had the physical strength to load the ammunition into the magazine" and "was able to put the rounds into the magazine," R3 234. The demonstration was not repeated in front of the jury.

Janet Wing, Mr. Urban's mother, was called by the State to testify. R3 126–27. The prosecutor attempted to ask her about a petition for hospitalization she filed on May 27, 2016—but subsequently rescinded—which described Mr. Urban's treatment of his belongings and the condition of his home. R3 129–30. Defense counsel objected, and the court excused the jury to consider the issue of admissibility. R3 128–32. Defense counsel maintained that Ms. Wing could testify to "what [she] notice[d] when [she] went over to the house," as long as she did not mention the former petition for hospitalization. R3 130–31. In actuality, Ms. Wing had not been in Mr. Urban's home in over five months—her report was partially based on "[s]ome of what the neighbors . . . told [her]." R3 133. Per the petition and Ms. Wing's own testimony, she simply wanted to get treatment for Mr. Urban. R3 137, 139. Again, defense counsel objected on the basis of relevance, but only with respect to the hospitalization petition, not regarding the state of Mr. Urban's house. R3 136. Defense counsel had "no problem" with Ms. Wing testifying "the house was in bad shape." R3 140.

The court allowed the prosecution to proceed with its examination of Ms. Wing, but only regarding her personal knowledge. R3 140–41. Ms. Wing testified Mr. Urban's home was "a mess" around Christmas time—it was "not organi[zed]," and Mr. Urban had two dogs, "so everything . . . had dog hair on it." R3 141–42. She then testified that, although Mr. Urban was "a good[,] loving guy," she believed he suffered from alcoholism. R3 142–44.

The State also called Sumayah ("Sammi") Al-Amin, Mr. Urban's daughter. R2 145–49. Ms. Al-Amin testified about a prior argument between Mr. Urban and her mother (Mr. Urban's former wife), Philana Hooper. R2 149–53. When asked about her father when he was drinking, Ms. Al-Amin testified he acted "differently," but had never seen him become violent with anyone. R2 156–58. Ms. Hooper then testified about a conversation with her youngest daughter in which the daughter recalled a text from Ms. Al-Amin regarding alleged threats by Mr. Urban. R3 157. Defense counsel made no objection to Ms. Hooper's testimony. On cross-examination, Ms. Hooper admitted that Mr. Urban had never hit her, kicked her, or kept her against her will. R3 161.

Deputy Brian Thomas of the Eaton County Sheriff's Department that Ms. Hammond's transport to Sparrow Hospital was the typical and default response to any injury. R2 53. He explained that when police were dispatched to Mr. Urban's home after Ms. Hammond's interview, Mr. Urban was "cooperative" and complied fully with law enforcement. R2 21, 60. In discussing the evidence collection process, Deputy Thomas conceded the officers were unable to locate any "sawed-off shotgun," despite Ms. Hammond's testimony and an affirmative search in "every room." R2 50–51.

Upon reviewing his report from that day, Deputy Thomas testified Ms. Hammond told him she had been hit across the back of the head with the bottle of rum and "struck . . . multiple

times with a handgun." R2 70. He admitted that, with respect to the white shirt Ms. Hammond claimed to subsequently held to her head after being injured, R1 174, there were only three "rather small" blood spots, the largest of which was no bigger than "a pea." R2 71–72.

Detective Buxton of the Eaton County Sheriff's Department testified regarding his interview with Ms. Hammond at Sparrow Hospital. R3 164, 166. The State played an audio recording of the conversation. R3 168–69. Detective Buxton discussed photos he took of Ms. Hammond's alleged injuries at the hospital, noting that he could not "necessarily[] see a cut" on the back of her head. R3 172. Detective Buxton described Mr. Urban's home as having "a bad odor throughout" with some broken doors, holes in the walls, and profanities painted on the wall in his bedroom—all with no objection from defense counsel. R3 176–77. Detective Buxton admitted that despite a thorough search of Mr. Urban's home, he was unable to locate the sawed-off shotgun described by Ms. Hammond. R3 178–80. He described photographs he took of Mr. Urban, which documented bruises and scratches on Mr. Urban's neck, arms, and wrists. R3 183–84.

Dr. Gregory Fuller examined Ms. Hammond at Sparrow Hospital. R3 17–18. When Ms. Hammond presented as a patient, she alleged that, among other things, she had been "struck in the head" with the handgun. R3 19. The witness found the injury was "more like . . . an abrasion or something had rubbed hard against her head." R3 20. There was "some redness," but no visible bruising in the area where Ms. Hammond claimed to have been "struck" with the handgun. R3 21. Dr. Fuller found no additional injuries anywhere on Ms. Hammond's body—after examining "her neck/chest[,] . . . [arms,] torso, chest, abdomen, pelvis, [and] legs"—save for a mark and some bruising on her forearm. R3 22. Per "common practice," he instructed Ms. Hammond to take "some pain reliever" similar to "Advil or Motrin." R3 24–25, 33. Dr. Fuller

admitted that had Ms. Hammond not come to the hospital, her abrasion would have "healed itself," and she "would've been fine." R3 39. Ms. Hammond's transport, treatment, and release all occurred within a matter of hours. R3 33.

Katie Urka, a forensic scientist with the Michigan State Police, testified for the State. R2 92–93. As the DNA analyst assigned to this case, she processed the samples collected from Mr. Urban's home for DNA analysis. R2 97. At the State's request, Ms. Urka briefly discussed DNA, chromosomes, and the general mechanics of DNA analysis. R2 97–100. She then testified as to how she handled the DNA samples and testing process. R2 101–114. First, she concluded that the buccal swab from the handgun contained a partial mix DNA profile. R2 104. Defense counsel objected on the basis of "relevance," arguing "[e]ither she identified or she did not," but the court allowed the prosecution to continue questioning Ms. Urka regarding the partial match. R2 106–07. On cross-examination, Ms. Urka ultimately conceded she could not identify whose saliva was on the gun. R2 124. Ms. Urka also testified that Ms. Hammond "matched" the DNA profile from the shirt, and Mr. Urban was "excluded as a donor." R2 109–10. She explained that the DNA collected from the bedroom door was another "mixed" profile—Ms. Hammond "matched" the major donor, Mr. Urban was "excluded" as the major donor, and the minor donor was "not suitable for comparisons." R2 110. She reached the same conclusions with respect to a mixed profile of the DNA collected from the black leggings. R2 112–13. Finally, she described the DNA profile from the pillowcase, which she testified that Mr. Urban "matched," and from which Ms. Hammond was "excluded." R2 113–14. At no point did the prosecution ask Ms. Urka discuss the statistics behind any of her findings, and defense counsel did not object to the absence of any statistical testimony.

Detective Lieutenant Scott Hrcka, a latent print examiner and supervisor at the Lansing Forensic Laboratory. testified regarding the laboratory's typical handling of forensic evidence and its treatment of the specific evidence collected. R3 44–66. He described the exams he conducted on the magazine, handgun, and bottle of rum, R3 43–66, but admitted that none of the three items produced any latent prints for comparison, R3 67.

Joni Johnson, a forensic scientist with the Michigan State Police testified regarding the typical handling process for DNA samples and explained serology in general terms. R3 79–82. She described how she tested the handgun for DNA evidence, which produced only a "weak presence" for saliva, R3 82–85, meaning that it "could indicate that it was a small amount of saliva that was actually, possibly saliva [sic] that was actually present," R3 110. With respect to the bottle of rum, Ms. Johnson saw "no visible staining" from any blood, R3 87–88, while the shirt, swabs from the bedroom door, leggings, and pillowcase indicated the "possible presence of blood," R3 89–96. Accordingly, she passed those DNA samples and the buccal swabs along for actual comparison. R3 96–97.

On the third day of trial, the prosecution rested, R3 215, and Mr. Urban then expressed his intention not to testify, R3 229–31. The next day, the State and the defense each presented their closing arguments, and the jury received its instructions. R4 3–74. The jurors began their deliberations, R4 75, and, on the fifth day, they returned their verdict, R5 13. The jury found Mr. Urban guilty of (1) unlawful imprisonment; (2) assault with a dangerous weapon (the liquor bottle); and (3) misdemeanor domestic violence. R5 13. The original felony domestic violence charge was for "aggravated domestic assault," but the jury determined that the State failed to

satisfy its requisite burden of proof.[2] See R4 70–72, R5 13. The jury returned a verdict of not guilty for (1) assault with a dangerous weapon (a handgun or shotgun); and (2) felony firearm. R5 13.

At sentencing, Ms. Hammond's mother was permitted to read a victim impact statement into the record. S 5–7. Despite numerous attempts to contact Ms. Hammond regarding the hearing, she was completely unresponsive, ignoring all of the communications. S 6. Ultimately, the prosecution explained that Ms. Hammond did not attend because she did not want to miss school, which would require her to make up classes. S 5. Ms. Hammond's mother read the statement, and, when she finished, defense counsel questioned the statement's authorship—he noted that it sounded like it was written by her mother, a psychologist, and it used phrases "strikingly similar" to those used in the scoring of the sentencing guidelines. S 14. In addition, the letter repeatedly referred to "Jimmy," which was not the way Mr. Urban or Ms. Hammond spelled his name. S 30. Nevertheless, the judge treated the statement as though it had been written by Ms. Hammond.

The judge began to score the offense variables, and—over defense counsel's objections—scored OV 1 at 15 points and OV 2 at 5 points for the use of a firearm. S 24–25. The judge scored OV 3 at 5 points, but then scored OV 4 at 10 points, because, "in reviewing everything prior to coming into court . . . , [she] had already determined that OV [4] would remain at 10." S 30. The judge did not rely on the victim impact statement—rather, she reasoned that Ms. Hammond's trial testimony alone would suggest "serious psychological injury [requiring] professional treatment." S 30–31. Similarly, for OV 7, the judge concluded that Ms. Hammond's testimony described "sadistic" conduct—"conduct designed to substantially increase the fear and

[2] The only difference between the jury instructions for "aggravated domestic assault" and the lesser crime of "domestic assault" was the State's articulated burden to prove, beyond a reasonable doubt, "that the assault caused a serious or aggravated injury." R4 70–72.

anxiety of a victim during the offense"—which carried an all-or-nothing penalty of 50 points. S 31–40. In sum, Mr. Urban's OV totaled 85 points, which carried a minimum guideline range of 43 to 86 months. S 43–44. The State asked for a sentence at the top of the guideline range, S 46–47, but defense counsel pointed out that, without the 50 points from OV 7, Mr. Urban's guideline range would be cut nearly in half, falling to 29 to 57 months, S 50–52. In determining Mr. Urban's sentence, the judge found it important that Ms. Hammond's family would suffer as well "by watching [her] suffer" and "thinking about what happened to somebody they love." S 52. Accordingly, to "send a message to people," the judge sentenced Mr. Urban to 84 months to 15 years in prison, with credit for the 308 days he had already served. S 54.

On July 18, 2017, the Court of Appeals affirmed the convictions and sentences. The Court published the opinion on August 31, 2017.

I. THE TRIAL COURT'S ADMISSION OF DNA EVIDENCE FOR WHICH THE STATE FAILED TO PROVIDE ANY STATISTICAL INTERPRETATION CONSTITUTES A CLEAR ERROR—OR, AT A MINIMUM, DEFENSE COUNSEL'S FAILURE TO OBJECT CONSTITUTES INEFFECTIVE ASSISTANCE OF COUNSEL—THAT RESULTED IN PREJUDICE AND WARRANTS THE GRANT OF A NEW TRIAL.

Standard of Review:

An appellate court looks for clear error in reviewing a trial court's admission of purported DNA matches for which the State failed to provide any statistical evidence. Although defense counsel did not object to the lack of interpretation, the omission affected the defendant's substantial rights, making the clear-error standard appropriate. *People v Carines*, 460 Mich 750, 763–64; 597 NW3d 130 (1999).

A claim of ineffective assistance of counsel "presents a mixed question of fact and law" when first raised on appeal. *People v Armstrong*, 490 Mich 281, 289; 806 NW2d 676 (2011). Questions of law are reviewed *de novo*, and the trial court's findings of fact are reviewed for clear error. *People v Chenault*, 495 Mich 142, 159; 845 NW2d 731 (2014).

Argument:

The State's failure to provide any statistical analysis of its proffered DNA "matches," and the court's subsequent admission of that evidence, constituted clear error. In *People v Coy*, 243 Mich App 283, 302; 620 NW2d 888, 899 (2000), the Court held that "some qualitative or quantitative interpretation **must** accompany evidence of [a] potential [DNA] match." *Id.* (emphasis added). The Court recognized that statistical analysis is "essential for the evidence to have relevance or meaning to the trier of fact." *Id.* at 298. Because the evidence of a potential

DNA match in the case lacked **any** statistical interpretation, the *Coy* Court deemed it inadmissible. *Id.* at 301.

As in *Coy*, the State provided no such interpretation here. Ms. Urka's testimony regarding partial and full DNA matches included **no** "qualitative or quantitative" analysis—she simply recited her findings of full or partial matches. R2 106–114. The purported matches carried no relevance or meaning in the absence of accompanying statistics. The State's indisputable failure to supply the jury with any qualitative or quantitative interpretation should have rendered that evidence inadmissible, and the court's admission constitutes clear error.

Mr. Urban's trial counsel inexplicably and unreasonably failed to object to the admission of the State's DNA "matches" without any supporting analysis. See *People v Coy, supra* at 302. R2 106–14. The DNA evidence was key to the State's case—it provided alleged scientific and objective corroboration to Ms. Hammond's version of the events, and it featured prominently in the State's closing argument:

> [MS. VAN LANGEVELDE] Let's talk again about serology and DNA. The white tank top found in the zebra room tested positive for blood. The blood's sent on to DNA. The blood swab for DNA comes back that's Monica Hammond's blood. James Urban is excluded as the donor of the blood on the tank top.
>
> The swab taken on the back of the bedroom tested positive for blood in serology. So, that blood sample was sent on to DNA. DNA says it tested -— compared it to Monica's. And Monica was found to be the major donor of the blood on the door.
>
> The black leggings, again, tested positive for blood in serology. Serology takes that swab, blood swab, sends it to DNA. DNA compares it. Tests positive for Monica -- or, compares the same to Monica Hammond's blood.
>
> And the pink pillowcase, again, tested positive for blood. They send that blood swab on to DNA. It matches Mr. Urban's DNA. It's Mr. Urbans blood.
>
> **The physical evidence matches Monica's story**. He gets cut by the mirror. And guess what? His blood is on the pillow, which is

> by the broken mirror. She says, He hit me in the head with a gun and I put it, my head, against the back of the door. It's her blood on the back of the door. I got blood on my pants because I touched the back of my head and then rubbed my hand on my pants. Its Monica's blood on the black pants. He made me put the gun in my mouth. And what do we have on the gun? Saliva.
>
> * * *
>
> Again, we know the door is closed when Monica's head is against it, bleeding, because there's blood on the back of the door. She wasn't able to leave when her head was bleeding. And we know that it's Monica's blood.

R4 19–20, 22. (Emphasis added).

The flawed admission of the evidence was a clear error by the trial court without regard to defense counsel's failure to interpose an objection. However, had this evidentiary defect been brought to the court's attention, and the jury not heard the DNA evidence, the jury may well have declined to convict Mr. Urban. This Court should reverse Mr. Urban's convictions and remand for a new trial in which Mr. Urban's constitutional right to effective assistance of counsel is protected.

The impermissible admission of this evidence affected the outcome of the proceedings by misleading the jury as to the veracity of the State's account of the altercation. In *Coy*, the Court focused on the central role that the proffered DNA evidence played as "the only remaining evidence implicating [the] defendant." *Coy*, 243 Mich App at 308, 312. It also considered conflicting testimony and improper characterizations of the DNA evidence by the State to find a sufficient showing of prejudice. *Id.* at 312.

Here, the prosecution relied on the purported DNA matches as the only real corroboration of Ms. Hammond's story. In its opening, the prosecution implored the jury to "look at the physical evidence, too," assuring that "the physical evidence and [Ms. Hammond's] story

supports [sic] each other," R1 118–19. In its closing, the State reiterated—time and time again—that DNA samples were "Monica Hammond's blood" and "Mr. Urban's blood." R4 19–20, 22. Once again, the State repeatedly argued that "[t]he physical evidence matches [Ms. Hammond's] story." R4 20.

Apart from the prosecution's reliance on the DNA evidence, only Ms. Hammond's account remained—inescapably inconsistent, both internally **and** with respect to her alleged injuries. Ms. Hammond's testimony simply did not add up: she could not keep details straight and, after presenting her account of the altercation, admitted that she misled and lied to responding officers and changed her story after the hospital conducted a toxicology report. R1 197–98, 202. In addition, her actual injury was inconsistent with her description of what had allegedly transpired. While she claimed her head was pistol-whipped with a 45-caliber handgun and repeatedly struck with a bottle of rum, Dr. Fuller found nothing more than an "an abrasion" and "some redness." R3 20–21. He acknowledged this abrasion would have healed without any medical intervention or treatment.

The DNA evidence bore the load of the State's burden; in light of other inconsistencies, the State relied on the DNA evidence to persuade the jury, but did so without providing the tools by which to understand that evidence. While the facts of record differ from *Coy*, the effect is the same: the lack of statistical analysis posed "risks of confusion of the jury," resulting in unfair prejudice to Mr. Urban, see *id.* at 302–03, particularly in light of the evidence's centrality to the State's case. The clear error and resulting prejudice of its admission, given the State's failure to supplement its DNA evidence with any statistical interpretation, warrants the grant of a new trial.

A defendant is entitled to a new trial when he demonstrates that his lawyer's performance was not objectively reasonable, and, but for that deficiency, a reasonable probability existed that

he would not have been convicted. *Strickland v Washington*, 466 US 668, 690; 104 S Ct 2050; 80 L Ed 2d 674 (1984); *People v Pickens*, 446 Mich 298; 521 NW2d 797 (1994). While a specific strategy may satisfy the reasonableness requirement, "a court cannot insulate the review of counsel's performance by calling it trial strategy." *People v Trakhtenberg*, 493 Mich 38, 52; 826 NW2d 136 (2012). Rather, the purported strategy "must be sound, and the decisions as to it objectively reasonable." *People v Ackley*, 497 Mich 381, 389; 870 NW2d 858 (2015).

Mr. Urban's trial counsel inexplicably and unreasonably failed to object to the admission of the State's DNA "matches" absent the foundational requirement of supporting analysis. See *People v. Coy*, 243 Mich App 283, 302; 620 NW2d 888 (2000); R2 106–14. The DNA evidence was central to the State's case—it provided corroboration to Ms. Hammond's claim, and it featured prominently in the State's closing argument. R4 19–20, 22. Had this evidentiary defect been brought to the court's attention, and the jury not heard the flawed and incomplete DNA evidence, the jury may well have declined to convict Mr. Urban. Under these circumstances, defense counsel had no reasonable strategy for failing to object to the improper admission. No reasonable or even possible benefit accrued to Mr. Urban through the admission of the DNA evidence This Court should reverse Mr. Urban's conviction and remand for a new trial in which Mr. Urban's constitutional right to effective assistance of counsel is protected.

II. THE INEFFECTIVE ASSISTANCE OF DEFENSE COUNSEL WARRANTS THE GRANT OF A NEW TRIAL.

Standard of Review

As previously discussed, a claim of ineffective assistance of counsel "presents a mixed question of fact and law," *People v Armstrong*, 490 Mich at 289, in which questions of law are reviewed *de novo*, and the trial court's findings of fact are reviewed for clear error, *Chenault*, 495 Mich at 159.

Argument

Both the Michigan and U.S. Constitutions require that a defendant be afforded the effective assistance of trial counsel for his defense. US Const, Am VI; Const 1963, art 1, § 20. A defendant deserves a new trial when he shows that his lawyer's performance failed to meet an objective standard of reasonableness, and, but for the deficiency in performance, there is a reasonable probability that he would not have been convicted. *Strickland*, 466 US at 690; *Pickens*, 446 Mich 298. Yet a rote invocation of "strategy" is not enough, *Trakhtenberg*, 493 Mich at 52—an alleged tactic must be legitimately "sound" and supported by "objectively reasonable" decisions, *Ackley*, 497 Mich at 389.

In addition to his failure to object to the erroneous admission of DNA evidence, Mr. Urban's trial counsel made several errors that cannot be characterized as strategic and resulted in a deprivation of his constitutional right to effective assistance of counsel. But for any of these errors in representation, the jury might well have reached a different verdict.

Unprompted Solicitation of Uncharged Illegal Act

During the cross-examinaiton of Ms. Hammond, defense counsel inexplicably elicited testimony that Mr. Urban possessed an "altered" shotgun, which itself is a crime to possess. [3]Unprompted, defense counsel asked:

> Q. [MR. FREEMAN]: Okay. All right, so the first time Mr. Urban, apparently, needs to go to the bathroom, he's got a 45 caliber, semi-automatic handgun and he's got a—would you call it a sawed-off shotgun?
> A: Yes. R1 222.

Counsel then compounded the error by bringing out that Mr. Urban told Ms. Hammond about the illegality of the altered gun:

> Q. Okay, thank you. If—if you know—and if you don't, that's fine—that shotgun that I referred to as sawed-off and you agreed, was that unlawful for him to possess?
> A. Yes.
> Q. He told you that, didn't he?
> A. Yes, he did. R1 228.

In *People v Drake*, 142 Mich App 357; 370 NW2d 355 (1985), the Court considered prejudicial facts directly analogous to those introduced in this case. In *Drake*, the trial court admitted evidence - over the objections of defense counsel - that "1) the handgun that killed the victim was stolen, 2) a second, unregistered handgun was found in defendant's bedroom, and 3) a third stolen handgun was found in defendant's automobile." *Id.* at 359. In addition, "the prosecutor asked defendant if he knew that the law required registration of handguns. The prosecutor also commented on the fact that defendant had stolen handguns in his possession while claiming he did not know how to handle weapons." *Id.*

The *Drake* Court found it "plain . . . that the stolen nature of the murder weapon was irrelevant to the case" and "equally clear that the other two weapons were erroneously admitted because they had absolutely no relevance to the determination of defendant's guilt as to the

[3] MCL 750.224b. Possession of a "short-barreled shotgun" is a felony punishable by up to five years in prison.

homicide charge." *Id.* The Court looked to MRE 402, which prohibits the admission of irrelevant evidence; MRE 403, which permits the exclusion of evidence for which the risk of unfair prejudice substantially outweighs any probative value; and MRE 404(b), "which states that other crimes, wrongs or acts are inadmissible to prove the character of a person in order to show that he acted in conformity therewith on a particular occasion." *Id.* at 359–60. Accordingly, it concluded that the trial court's admission of the evidence constituted reversible error. *Id.* at 360.

The *Drake* Court then determined that the error was not harmless—to the contrary, the Court explained that the evidence "could only have **inflamed** the passions of the jury" and "added absolutely nothing to the case[,] . . . . except to suggest to the jury that [the defendant] was a bad man." *Id.* (emphasis added). It characterized the evidence as "so patently inflammatory that it deprived defendant of a fair trial." *Id.*

This case involves the same sort of "patently inflammatory" evidence that the *Drake* Court denounced. Like the defendant in *Drake*, Mr. Urban was improperly forced to wear the prejudice of testimony alleging he knowingly possessed an illegally sawed-off shotgun, a matter entirely irrelevant to the details of the altercation in question. As the *Drake* Court explained, the illegal nature of the alleged possession - of which there was no evidence, apart from Ms. Hammond's testimony - added "absolutely nothing" to the case.[4] Accordingly, it could only be inflammatory. Unlike *Drake*, however, and even worse, this unfair prejudice came at the hands of Mr. Urban's **own** attorney, unprompted by the State.

Opening the door to—and **emphasizing**—evidence of crimes outside the bounds of the questioning cannot be explained as reasonably strategic, and constitutes ineffective assistance of counsel. Cf. *People v Wise*, 134 Mich App 82, 98; 351 NW2d 255 (1984) (recognizing that

[4] Mr. Urban was never charged under MCL 750.224b with the possession of this alleged weapon, and no such weapon was found or recovered during the intensive search of Mr. Urban's residence.

strategically admitting to "inevitable" and damaging information is defensible). No potential benefit existed for Mr. Urban—the introduction of such evidence **only** served to hurt him. As the *Drake* Court recognized, it is entirely possible that the jury could have declined to convict Mr. Urban had the presentation not been tainted with the unnecessary evidence of other crimes. See *id.* For this reason alone, Mr. Urban is entitled to a new trial, free of the improper and prejudicial evidence unreasonably brought forth by his own lawyer.

Failure to Object to Blatantly Prejudicial and Irrelevant Evidence Concerning Defendant's Religious Beliefs

Defense counsel also allowed Ms. Hammond, at the State's urging, to describe Mr. Urban's Islamic religious practice in an inflammatory and unnecessary way. The prosecutor explicitly acknowledged that it sought to elicit evidence that Mr. Urban practiced Islam:

> Q. [MS. VAN LANGEVELDE]: What was he saying at this point?
>
> A. He was saying a lot of different like Muslim things. He was speaking in Arabic, saying, "I told you never to underestimate me." He—he just—
>
> Q. Let me ask you about that.
>
> A. He said a lot of like things in Arabic. He said some prayers, talked about his ex-wife.
>
> Q. That was what I was gonna ask you. Was his ex—ex-wife a particular religion?
>
> A. She was Muslim.
>
> **Q. And do you know if he practiced when he was with his ex-wife?**
>
> **A. Yes, he did.**
>
> Q. When he was saying it, what were you doing?
>
> A. Crying. I told him I hated Muslims, I hated the fact that they made him this way. I hated the fact that he felt like he was a bad person.
>
> Q. Why were you saying that to him? Because of what he was saying?
>
> A. I could tell he felt some sort of way about whatever he was talking about because he was crying and emotional. And that entire time he wasn't emotional where he felt bad. He felt legitimately bad at this point. I don't know what it was in his mind that he was thinking about, why he brought it up or what he was

> saying when he was speaking Arabic or whatever language it was, but I don't—I mean, it was, to me, crazy. It was—I thought he's losin' his damn mind right now. R1 178–79. (Emphasis added).

The religious affiliation and practices of Mr. Urban and his ex-wife, Ms. Hooper, had absolutely no bearing on the case at hand. The prosecution had no legitimate basis upon which to solicit that information, yet it repeatedly and transparently sought to emphasize it, even affirming that it "was gonna ask" Ms. Hammond about it. R1 178. While the State may not be able to prevent a witness from unexpectedly introducing the subject of religion, it cannot and should not continue to push the issue, as it did here. In the same vein, defense counsel's failure to object to this continued questioning cannot be construed as objectively reasonable in light of its inevitable and extreme prejudice.

The Michigan Supreme Court recognized as much in *People v Bahoda*, 448 Mich. 261, 266–67; 531 NW2d 659 (1995), when it forcefully denounced the use of such prejudicial allusions:

> As with all forms of prosecutorial misconduct, this Court abhors the injection of racial or ethnic remarks into any trial because it may arouse the prejudice of jurors against a defendant and, hence, lead to a decision based on prejudice rather than on the guilt or innocence of the accused. Therefore, this Court is not hesitant to reverse where potentially inflammatory references are intentionally injected, with no apparent justification except to arouse prejudice. In reviewing such claims, this Court examines the remarks in context to determine whether they denied defendant a fair trial. Id. (citations omitted).

The Court of Appeals confirmed this rule in *George v Travelers Indemnity Co.*, 81 Mich App 106, 114; 265 NW2d 59 (1978):

> Even in the occasional case where racial, ethnic, or religious matters are relevant to the issues, there is always the risk of incidentally arousing prejudice and this Court abhors injecting the poison of prejudice into any legal proceeding. The law is blind to differences in race, religion, and nationality. Appeals to prejudice overt or covert

> have no place in the administration of justice. It is reversible error to deny the opposing party a fair trial by making irrelevant and inflammatory ethnic allusions. Id. (citations omitted).

Ms. Hammond's inflammatory descriptions of Mr. Urban's "Arabic prayers" and Muslim practices had no effect other than to prejudice the jury, especially when considered in the context of her depictions of Mr. Urban as "crazy" and "losin' his damn mind." R1 178–79. These comments and testimony were particularly incendiary in today's social and political climate.

Because they carried no relevance - yet were deliberately solicited by the State - these descriptions were **meant** to create prejudice against Mr. Urban. Indeed, the State sought to paint Mr. Urban as unstable and religiously divergent from most of American society in order to improperly distract the jury from its actual duty to assess Ms. Hammond's truthfulness regarding the events of the altercation. As Michigan courts have repeatedly recognized, Ms. Hammond's characterizations unquestionably carried the power to influence the jury's finding of guilt, and defense counsel's failure to object has no strategic basis. No benefit could possibly have inured to Mr. Urban by allowing such inflammatory and irrelevant characterizations. Alone, this failure and the extremity of its resulting prejudice compel the grant of a new trial.

Failure to Object to Misleading Jury Instruction Following Demonstration

After the defense's requested demonstration, out of the presence of the jury, in which Ms. Hammond attempted to load the magazine, defense counsel failed to object to the trial court's incomplete and misleading description of the results. When asked to demonstrate her ability to load the magazine, Ms. Hammond was unable to do so without assistance:

> Q.[MR. FREEMAN]: Miss Hammond, can you load that magazine for me, please?
> A. It's not going down anymore. Do you want me to keep trying?
> Q. Tell—tell me when you're finished, ma'am.
> A. Do you want me to keep trying when I can't get it to go down anymore?

> [MS. VAN LANGEVELDE]: I think you're doing it backwards. R3 225.

While Ms. Hammond proved physically capable of loading the magazine, she did not possess the knowledge of how to actually load it- she initially loaded it backwards, and only figured out how to load it correctly when specifically informed of her error by the prosecutor. R3 223–26.

This error was probative, especially in light of Ms. Hammond's testimony she was forced to load and reload the magazine "three or four" times. R1 174. The court's description of the results of the demonstration, once the jury was returned to the courtroom, however masked this inconsistency with a deceptive and overly simplistic characterization: the jury was simply instructed that, at the defense's request, Ms. Hammond showed she "was able to put the rounds into the magazine:"

> (At 3:35 p.m., jury enters courtroom)
>
> THE COURT: Thank you. You may be seated. Ladies and gentlemen of the jury, by stip -- stipulation of the prosecutor and the defense attorney, we performed a demonstration while you were out of the courtroom.
>
> The victim, Miss Hammond, took the stand, and she demonstrated that she had the physical strength to load the ammunition into the magazine. So, were talking about Ms. -- could you please get a glove and just hold it so I -- they can see what we're talking about.
>
> MS. VAN LANGEVELDE: Yes, Your Honor.
>
> THE COURT: Thank you.
>
> MS. VAN LANGEVELDE: You're welcome.
>
> THE COURT: At the request of the defense, the victim was called to the stand. We provided her with the magazine, which Ms. Van Langevelde is showing you. Mr. Freeman provided her with eight bullets, the eight rounds of ammunition, which is Exhibit 90 —
>
> MS. VAN LANGEVELDE: Ninety-eight, Your Honor.
>
> THE COURT: -- 98, Exhibit 98. And she was able to put the rounds into the magazine.

R3 234-235..

Defense counsel's failure to object to this limited characterization of the results of the demonstration cannot be construed as strategic—the instruction emphasized that the demonstration was performed at the defense's behest, yet produced results that appeared to support the State's account of the altercation. While the demonstration was proposed by the defense primarily to test whether Ms. Hammond had the physical strength to load the bullets into the gun's magazine, her failure to recognize that she was attempting to load the bullets backwards was certainly relevant to her knowledge of how to load the gun, and thus inconsistent with her assertion that she loaded it numerous times, at Mr. Urban's request, on the night of the charged incident. This discord between her testimony and the actual results of the demonstration was highly relevant, and may likely have influenced the jury as to its assessments of credibility and ultimate convictions. Trial counsel should have insisted that the court inform the jury **both** that Ms. Hammond had the strength to load the bullets, and also tried to load them improperly. Failing to correct the misleading instruction only benefitted the State by bolstering Ms. Hammond's perceived truthfulness—it offered no conceivable advantage to Mr. Urban. To avoid the taint of this prejudice, Mr. Urban should be granted a new trial.

Failure to Object to Irrelevant Testimony Regarding Defendant's Domestic Upkeep

Mr. Urban's trial lawyer also failed to object to the relevance of the State elicited evidence from Detective Buxton and Ms. Wing that Mr. Urban's home was unkempt and poorly maintained, with profanities painted on the walls and a "bad odor throughout," R3 176–77. In fact, with respect to Ms. Wing, defense counsel explicitly permitted these prejudicial characterizations, offering that he had "no problem" with her testifying that "the house was in bad shape." R3 140.

These factual observations were entirely irrelevant and blatantly prejudicial. As with Ms. Hammond's testimony regarding religion, the State relied on these disparaging descriptions to supplement the questionable veracity of its own evidence. Defense counsel's failure to interpose an objection and stem this tide of damaging descriptions—indeed, his express **assent** to such depictions—could not be characterized as strategic, and may well have influenced the jury's finding of guilt. Mr. Urban is entitled to a new trial with a jury that is not influenced by such inflammatory, irrelevant, and prejudicial material calculated to create bias against him.

An appellate court may review a claim of constitutionally ineffective counsel based on the existing record, without any need for remand for an evidentiary hearing, where the deficient performance is clear on that record, and the court can judge the prejudicial impact of the error[s]. See, for example, *People v Armendarez,* 188 Mich App 61; 468 NW2d 893 (1991). In this case, the existing trial record is sufficient for this Court's review, as no reasonable strategic grounds could exist to justify trial counsel's failure to object to the irrelevant and prejudicial evidence detailed above. These errors, both individually and in their cumulative impact, render the guilty verdicts unreliable. In the alternative, if this Court finds the current record insufficient to rule on the merits of Mr. Urban's claims, the matter should be remanded to the trial court for a *Ginther* hearing.[5]

This Court should find that Mr. Watts was denied his Sixth Amendment right to the effective assistance of counsel, and that the deficient performance of his trial attorney denied him a fair trial, as a reasonable probability existed that he would not have been convicted absent

[5] *People v Ginther,* 390 Mich 436; 212 NW2d 922 (1973).

counsel's errors. *Strickland v Washington*, *supra*. The convictions should be reversed, and the matter remanded for a new trial.

III. THE SENTENCING COURT'S ABUSE OF DISCRETION IN INACCURATELY SCORING THE SENTENCING GUIDELINES AND INCREASING THE ATTENDANT RANGE WARRANTS THE GRANT OF A NEW SENTENCING HEARING.

Standard of Review

This Court looks for an abuse of discretion in reviewing the lower court's sentencing determination. See *People v Hornsby*, 251 Mich App 462, 468, 659 NW2d 700 (2002).

Argument

The trial judge abused her discretion by improperly scoring Offense Variables 4 and 7. Those errors led to an increase in the guidelines range considered by the court. Trial counsel for Mr. Urban timely objected to the scoring of both of these variables. (S, 27-40).

Offense Variable 4

Offense Variable 4 ("OV 4") accounts for "psychological injury to a victim." MCL 777.34(1). OV 4 is an all-or-nothing factor—the only options are to assign 10 or 0 points. MCL 777.34. The instructions for scoring provide that "[t]en points may scored if the victim's serious psychological injury may require professional treatment. Whether the victim has sought treatment for the injury is not conclusive." MCL 777.34(2). Some evidence of psychological injury must exist in the record, however—it is not enough to assume that the crime itself would cause psychological harm. *People v Lockett*, 295 Mich App 165, 183; 814 NW2d 295 (2011).

The sentencing court's analysis of OV 4 relied explicitly—and improperly—on the nature of the crime itself. While the impact statement referenced psychological harm and related treatment, S 10–11, it was not the basis for the court's analysis. As the sentencing judge conceded, prior to the submission of the impact statement, "no information had been submitted

to the Eaton County Prosecutor's Office, of any type, verifying that there was serious psychological injury to the victim." S 27. The prosecution incorrectly argued that, "[e]ven without [the impact statement], considering the testimony, considering what the victim went through and what the defendant was found guilty of, . . . that's the kind of situation that is going to cause someone traumatic mental injury." S 28. Judge Cunningham agreed that "in reviewing everything prior to coming into court"—**prior** to the submission of the impact statement— she "had already determined that OV four would remain at 10." S 30. The judge explained that "all of the things that happened that [the court] heard firsthand from [Ms. Hammond] and observed firsthand in the courtroom justify scoring OV four at 10 points," *id.*, notwithstanding the trial record's complete lack of any evidence of "serious psychological injury."

As *Lockett* makes clear, such a conclusory assumption is impermissible. *Lockett*, 295 Mich App at 183. This assumption is particularly salient in light of the impact statement's contested authorship. Mr. Urban's name was misspelled throughout—instead of "Jimi," the statement referenced "Jimmy," the way someone unfamiliar with Ms. Hammond and Mr. Urban's relationship would phonetically infer that Mr. Urban's nickname name was spelled. This concern becomes even more pronounced when considered in context: Ms. Hammond ignored the State's repeated attempts at contact, and she ultimately chose not to attend the sentencing hearing—failures that precluded any opportunity for the court to confirm the statement's authenticity. Given the questionable circumstances surrounding the statement's submission, the sentencing court should have relied solely on the trial record, and ruled not to score 10 points for OV 4. Accordingly, Mr. Urban should have received 0 points under OV 4.

Offense Variable 7

Offense Variable 7 ("OV 7") accounts for "aggravated physical abuse." MCL 777.37(1). Like OV 4, OV 7 is an all-or-nothing factor, as it requires the court to assign either 50 or 0 points. See *id.* Under OV 7, 50 points are assigned where "[a] victim was treated with sadism, torture, excessive brutality, or similarly egregious conduct designed to substantially increase the fear and anxiety a victim suffered during the offense." MCL 777.37(1)(a). "Sadism" is defined as "conduct that subjects a victim to extreme or prolonged pain or humiliation and is inflicted to produce suffering or for the offender's gratification." MCL 777.47(3).

The tremendous weight of OV 7, coupled with its all-or-nothing assignment, compels the use of extreme care in its application. See *People v Martin*, unpublished opinion per curiam of the Court of Appeals, issued Apr. 10, 2007 (Docket No. 265385).[6] As the *Martin* Court explained, "trial courts should exercise caution when scoring this variable. Its large number of 'all-or-nothing' points, as well as its plain language, indicates that a score for this variable should be reserved for depraved criminal behavior that seeks gratification from unnecessarily torturing, brutalizing, or terrorizing a victim." *Id.* at 2.

For this reason, Michigan courts do not simply defer to a sentencing court's 50-point assignment under OV 7. In *People v Mielcarek*, unpublished opinion per curiam of the Court of Appeals, issued Aug. 16, 2007 (Docket No. 268894),[7] the Court determined that the application of 50 points was an abuse of discretion where the "defendant chased the victim out of the house into the cold at night, wearing only a T-shirt and underwear." *Id.* at 4. Likewise, in *People v Vanderleek*, unpublished opinion of the Court of Appeals, issued Nov. 6, 2008 (Docket No.

[6] Appendix A. Mr. Urban understands that unpublished opinions of the Court of Appeals do not create legal precedent that future panels of the Court are required to follow. The citations to the unpublished opinions in this brief are not intended as legal authority, but only to demonstrate—unless otherwise noted—how different panels of the Court have applied the appropriate legal standard.

[7] Appendix B.

282989),[8] the Court determined that the trial court did not abuse its discretion by assigning 0 points where an infant suffered "bruises around her eyes, under her chin, on her lower back, on the front of her legs, below her knees, and on her left arm," in addition to "a broken femur, acute and/or subacute subdural hematoma, and [potentially] broken ribs." *Id.* at 1.

In *People v Wilson*, 265 Mich App 386, 398; 695 NW2d 351 (2005), the Court determined that 50 points were warranted where "brutal" beatings required hospital treatment and subsequently left the victim "confined to a wheelchair for almost three weeks and then walk[ing] with the assistance of a cane for nearly three more weeks." In *People v James*, 267 Mich App 675, 680–81; 705 NW2d 724 (2005), the Court found 50 points appropriate where the "defendant repeatedly stomped the [unconscious] victim's face and chest, . . . deprived [the victim] of oxygen for a period of four to six minutes, causing . . . significant brain damage, and [rendering the victim] comatose with little or no chance of ever regaining consciousness."

Unlike the victims in *Wilson* and *James*, Ms. Hammond did not suffer the sort of incapacitation that would reflect "aggravated physical abuse"—upon leaving Mr. Urban's home, she went to the neighbor's house, smoked a cigarette, and decided to get a ride to the police station. R1 190. The hospital's actions affirm the same conclusion: the hospital declined to even admit Ms. Hammond, relying on "common practice" to instruct that her alleged injuries—described as a near-imperceptible "abrasion," R3 20, 172—would be best served at home with "Advil or Motrin." R3 24–25, 33. The examining physician admitted that had Ms. Hammond not gone to the hospital, her abrasion would have easily and fully healed with no medical intervention or treatment.

While OV 7 does not necessarily require "actual physical abuse," it would still necessitate a sufficient showing of "emotional or psychological abuse." *People v Mattoon*, 271

[8] Appendix C.

Mich App 275, 277; 721 NW2d 269 (2006). In *Mattoon*, the defendant was convicted of "kidnapping, felonious assault, and possession of a firearm during the commission of a felony," all of which stemmed from "an incident in which he held his girlfriend at gunpoint for approximately nine hours." *Id.* at 276. In a subsequent appeal, the Court gave weight to the length of captivity and the nature of the defendant's threats:

> At one point, defendant made her look down the barrel of the gun, and said he was going to "blow [her] brains out." The victim also testified that several times defendant took the bullets out of the gun and say [sic], "That ones' [sic] got your name on it, and that one's got my name on it, and that one's just in case it jams." The victim stated that defendant told her to think about what it would be like when her son, who was in eighth grade, came home and found yellow tape around the house and both her and defendant dead inside. *People v Mattoon*, unpublished opinion per curiam of the Court of Appeals, issued Oct. 18, 2007 (Docket No. 272549), p. 1.

The extremity of the circumstances in *Mattoon* far exceeds that presented in the case at bar. Tellingly, Ms. Hammond's own testimony reveals that, even under her purported storyline, she did not take Mr. Urban seriously. She recalled that, as the altercation progressed, she simply felt "angry" and "over it." R1 166, 184. She alleged Mr. Urban threatened to kill them both when he finished the liquor and cigarettes, but she then explained she **encouraged** Mr. Urban to keep drinking, ignoring the claimed threat on the assumption that Mr. Urban would just "want go to the store and get another [bottle of liquor]." R1 183–84. Such disregard of a threat - admitted under Ms. Hammond's own telling - is plainly inconsistent with the notion that Mr. Urban treated her with "sadism[] . . . or similarly egregious conduct designed to substantially increase the fear and anxiety a victim suffered during the offense." MCL 777.37(1)(a). Ms. Hammond did not suffer in the manner contemplated by OV 7 if, from a preliminary standpoint, she did not even find Mr. Urban's alleged threats credible. In reality, per Ms. Hammond's testimony, Mr. Urban himself became emotional, and, at one point, began to cry, R1 177 - behavior completely

at odds with any assertion that Mr. Urban "subjected [Ms. Hammond] to extreme or prolonged pain or humiliation . . . for [his own] gratification." MCL 777.47(3). Accordingly, Mr. Urban should have received 0 points under OV 7.

The Erroneous Increase in the Sentencing Range Caused by the Improper Scoring Warrants the Grant of a New Sentencing Hearing.

The incorrect scoring of the guidelines resulted in an inappropriately inflated sentencing range for Mr. Urban. Under the sentencing court's assessment, Mr. Urban received 85 points on the Offense Variables, which, when coupled with his Prior Record Variable total of 10 points,[9] carried a minimum guideline range (C-VI) of 43–86 months.[10] S 43–44. If his guidelines had been properly scored according to the preceding analysis—with no points under OVs 4 or 7—he would have received 25 points, and a recommended range of 19–38 months (C-III). MCL 777.64. Even if this Court finds that the scoring of OV 4 was correct, a correction to the scoring of OV 7 would have changed Mr. Urban's range to 29–57 months (C-IV). *Id.* Even with OV 4 improperly scored, the improper scoring of OV 7 changed the bottom of Mr. Urban's suggested range from 29 to 43 months, and the top of his suggested range from 57 to 86 months—a near-doubling of both limits. S 50–52. Under *People v Francisco*, 474 Mich 82; 711 NW2d 44 (2006), these disparities in the recommended ranges, founded on an improper analysis, compel the grant of a new sentencing hearing.

[9] The only PRV points assessed to Mr. Urban were for the multiple convictions in the present case, as he has no prior scorable criminal record.
[10] See Appendix D – copy of Sentencing Information Report.

SUMMARY AND RELIEF

WHEREFORE, for the foregoing reasons, Defendant-Appellant asks that this Honorable Court grant him leave to appeal, or any appropriate peremptory relief.

Respectfully submitted,

STATE APPELLATE DEFENDER OFFICE

/s/ Peter Jon Van Hoek

BY:_____

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Dated: September 12, 2017.

APPENDIX A

STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

SALVADOR ROBERT MARTIN,

Defendant-Appellant.

UNPUBLISHED
April 10, 2007

No. 265385
Antrim Circuit Court
LC No. 04-003780-FC

Before: Neff, P.J., and O'Connell and Murray, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of armed robbery, MCL 750.529, conspiracy to commit armed robbery, MCL 750.157a, first-degree home invasion, MCL 750.110a(2), and conspiracy to commit first-degree home invasion, MCL 750.157a. Defendant was sentenced as a third habitual offender, MCL 769.11, to concurrent prison terms of 270 to 810 months for the armed robbery and the conspiracy to commit armed robbery convictions and 117 to 351 months for the first-degree home invasion and conspiracy to commit first-degree home invasion convictions, with 182 days' credit for time served. Defendant appeals as of right his conviction and sentence. We affirm.

In February 2004, defendant, his brother Aaron Martin, and Charles (C.J.) Henry barged into the victim's home and demanded, at gunpoint, the victim's stock of homegrown marijuana. During the ordeal, the victim was pistol-whipped by Henry, punched by Aaron and defendant, and repeatedly threatened with death if he called the police. When the three men had taken everything, the marijuana and money, they made the victim stand bleeding on the front porch in his pajama bottoms and bare feet until they left.

Defendant first argues that he received ineffective assistance of counsel because his replacement counsel never renewed his original counsel's motion to suppress the victim's identification of defendant at his first preliminary examination. We disagree.

> To establish a claim of ineffective assistance of counsel, a defendant must show both that counsel's performance was deficient and that counsel's deficient performance prejudiced the defense. In order to demonstrate that counsel's performance was deficient, the defendant must show that it fell below an objective standard of reasonableness under prevailing professional norms. In so doing, the defendant must overcome a strong presumption that counsel's

> performance constituted sound trial strategy. [*People v Riley (After Remand)*, 468 Mich 135, 140; 659 NW2d 611 (2003), citations omitted.]

Between defendant's original bindover and the prosecutor's motion for a second preliminary examination, Henry and Aaron pleaded guilty to various charges in return for their testimony in this case. On the day set for a second preliminary examination, defendant did not appear at the courthouse and again failed to appear on the day set for defendant's motion to quash the bindover and suppress the victim's identification of him. After defendant's subsequent arrest, the district court held a second preliminary examination and took the testimony of defendant's two accomplices, who clearly identified defendant as the third individual at the scene. Although defendant's replacement counsel could have challenged the victim's identification of defendant at the first preliminary examination, this tack would have left the jury to hear only those identifications that were concrete and absolute: the identification by defendant's brother and his long-time friend. By bringing to light the victim's problems identifying each of the culprits, defense counsel could raise suspicion and doubt among the jurors about whether defendant was actually participating in the crime or whether the other two robbers were falsely accusing him to receive leniency. Under the circumstances, we are not persuaded that defendant's replacement counsel was performing ineffectively rather than strategically. *Id*.

Moreover, defendant's argument strains to suggest that the victim did not have any independent basis for identifying defendant and asserts that the identification derived from the suggestion of a detective who told the victim, well after the corporeal lineup, the number that represented defendant. The victim originally narrowed down a photographic array to defendant and one other individual and then picked out defendant from a randomly arranged group of spectators at the preliminary examination. Later, the other two robbers verified his testimony that he had an extensive, unobstructed face-to-face encounter with defendant. Under the circumstances, defendant fails to persuade us that the victim's identification at the examination was the product of an unduly suggestive procedure. *People v Carter*, 415 Mich 558, 599-600; 330 NW2d 314 (1982). Although the victim's identification was far from perfect, weighing those imperfections is generally a matter for the jury, so the judge would most likely have denied the motion anyway. *People v Barclay*, 208 Mich App 670, 676; 528 NW2d 842 (1995). An attorney is not required to file meritless motions. *People v Snider*, 239 Mich App 393, 425; 608 NW2d 502 (2000).

Defendant next argues that the trial court's sentence relied on facts that the jury did not find beyond a reasonable doubt, so his sentence violated the principle adopted in *Blakely v Washington*, 542 US 296; 124 S Ct 2531; 159 L Ed 2d 403 (2004). However, in *People v Drohan*, 475 Mich 140, 159-160, 164; 715 NW2d 778 (2006), our Supreme Court clarified that *Blakely* does not apply to the minimum sentence of intermediate sentencing schemes like the one Michigan uses, so defendant's argument fails.

Finally, defendant argues that the trial court erred by scoring offense variable seven (OV 7) at fifty points. We disagree. A trial court's discretionary scoring decisions should be upheld if there is any evidence to support the score. *People v Hornsby*, 251 Mich App 462, 468; 650 NW2d 700 (2002). We find no error in the trial court's decision that placing a gun barrel in the victim's ear, punching him, pistol-whipping him, and leaving him standing barefoot and half-naked bleeding in the cold was excessively brutal for this acquiescing victim, so we will not

disturb the trial court's score. MCL 777.37(1)(a). However, trial courts should exercise caution when scoring this variable. Its large number of "all-or-nothing" points, as well as its plain language, indicates that a score for this variable should be reserved for depraved criminal behavior that seeks gratification from unnecessarily torturing, brutalizing, or terrorizing a victim. *Id*. For example, in this case, some of the brutalizing behavior was aimed at persuading the victim to produce more money and was not necessarily designed to substantially increase the victim's fear and anxiety. Nevertheless, the evidence supported the score here because the three robbers went beyond the intimidation and brutalization necessary to complete their crime.

Affirmed.

/s/ Janet T. Neff
/s/ Peter D. O'Connell
/s/ Christopher M. Murray

APPENDIX B

STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

RONALD SCOTT MIELCAREK,

Defendant-Appellant.

UNPUBLISHED
August 16, 2007

No. 268894
Saginaw Circuit Court
LC No. 04-024231-FC

Before: Whitbeck, C.J., and Talbot and Zahra, JJ.

PER CURIAM.

In June 2005, defendant was convicted by a jury of possession of a firearm during the commission of a felony, MCL 750.227b, but the jury was unable to reach a verdict on an additional charge of assault with intent to commit murder, MCL 750.83. On January 2006, a second jury convicted defendant of the assault with intent to commit murder charge. He was sentenced to a prison term of 10 to 20 years, to be served consecutive to a two-year term of imprisonment that was imposed earlier for the felony-firearm conviction.[1] Defendant now appeals as of right. We affirm defendant's conviction, but remand for resentencing.

Defendant first argues that he was denied a fair trial because two prospective jurors who had family members who were clients of defense counsel, and one prospective juror who had previously worked with the victim, were all excused as jurors at trial. Conversely, the trial court did not excuse a juror who had worked with the prosecutor's wife.[2]

Defendant did not object to the trial court excusing any of the three jurors at trial. Therefore, this issue is not preserved. We review unpreserved issues for plain error affecting defendant's substantial rights. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999)

The conduct and scope of voir dire is within the trial court's discretion. *People v Sawyer*, 215 Mich App 183, 186-187; 545 NW2d 6 (1996). The goal is to uncover potential juror bias so

[1] This Court affirmed the felony-firearm conviction in *People v Mielcarek*, unpublished opinion per curiam of the Court of Appeals, issued November 16, 2006 (Docket No. 264961).

[2] Defendant does not challenge the failure to excuse this juror.

that the defendant may be tried by a fair and impartial jury. *Id.* Prospective jurors can be challenged for cause if they are "biased for or against a party or attorney." MCR 2.511(D)(2). Once a party shows that a prospective juror is covered by one of the grounds listed in the court rule, the trial court is without discretion, and must excuse him. *People v Eccles*, 260 Mich App 379, 382-383; 677 NW2d 76 (2004).

In this case, two prospective jurors stated that members of their families either were or had been represented by defense counsel. The existence of a former or present relationship with defense counsel, a person directly involved in the case, could create an atmosphere of bias, either for or against defense counsel, thereby affecting the jurors' abilities to render a fair and impartial verdict. The same is true with another prospective juror's former working relationship with the victim. By contrast, such feelings are less likely to result from having worked with the prosecutor's wife, who was not directly involved in the case. Under the circumstances, defendant has failed to show that the trial court's decision to excuse the three jurors in question was plain error. See *Eccles*, *supra* at 383-384.

Next, defendant argues that the trial court erroneously denied his requests for lesser offense instructions on felonious assault and simple assault. We disagree.

Claims of instructional error are reviewed de novo. *People v Hall*, 249 Mich App 262, 269; 643 NW2d 253 (2002). A trial court is only permitted to instruct on necessarily included lesser offenses. *People v Reese*, 466 Mich 440, 446; 647 NW2d 498 (2002); *People v Cornell*, 466 Mich 335, 341; 646 NW2d 127 (2002). An instruction on a necessarily lesser included offense is "proper if the charged greater offense requires the jury to find a disputed factual element that is not part of the lesser included offense and a rational view of the evidence would support it." *Id.* at 357.

Felonious assault is not a necessarily included lesser offense of assault with intent to commit murder, because it requires the use of a dangerous weapon, which is not an element of assault with intent to commit murder. Therefore, the trial court properly denied defendant's request for an instruction on felonious assault.

Conversely, simple assault is a necessarily included misdemeanor offense of assault with intent to commit murder. See *People v Van Diver*, 80 Mich App 352, 356; 263 NW2d 370 (1977). The distinguishing element between the two offenses is the specific intent to kill, which is required for the greater offense. We agree with the trial court, however, that an instruction on simple assault was not supported by a rational view of the evidence. Although defendant claimed that he only intended to scare or intimidate the victim, it was undisputed that defendant brought a loaded gun to the bedroom, that he shot through a telephone as the victim was attempting to call the police, and that he followed the victim downstairs and shot in her direction again as she was leaving the house. Defendant thereafter left the scene and told Heidi Doughty that he thought he had killed the victim. Defendant made subsequent comments indicating a continued intent to kill the victim. Viewed rationally, the evidence did not support an instruction in simple assault. Furthermore, the jury was instructed on another intermediate lesser offense, assault with intent to do great bodily harm less than murder, but found defendant guilty of the greater offense. In this circumstance, any error in failing to instruct on simple assault was harmless. *People v Antoine*, 194 Mich App 189, 190; 486 NW2d 92 (1992).

Next, defendant argues that there was insufficient evidence to support his conviction for assault with intent to commit murder. We disagree.

The sufficiency of the evidence is reviewed by evaluating the evidence in a light most favorable to the prosecution to determine whether a rational trier of fact could find every element of the crime charged proven beyond a reasonable doubt. *People v Petrella*, 424 Mich 221, 268-270; 380 NW2d 11 (1985). The resolution of credibility disputes is within the exclusive province of the trier of fact, *People v Vaughn*, 186 Mich App 376, 380; 465 NW2d 365 (1990), which may also draw reasonable inferences from the evidence, *People v Reddick*, 187 Mich App 547, 551; 468 NW2d 278 (1991).

"The elements of assault with intent to commit murder are (1) an assault, (2) with an actual intent to kill, (3) which, if successful, would make the killing murder." *People v Brown*, 267 Mich App 141, 147; 703 NW2d 230 (2005) (citation omitted). Defendant only challenges the intent element on appeal. Intent to kill may be inferred from any facts in evidence, including the defendant's conduct before and after the crime, and the use of a deadly weapon, such as a handgun. *People v Hoffman*, 225 Mich App 103, 111; 570 NW2d 146 (1997); *People v Anderson*, 209 Mich App 527, 537; 531 NW2d 780 (1995).

The evidence showed that, earlier in the day, defendant accused the victim of having an affair, and then went drinking. When he came home, he awoke the victim and again accused her of having an affair. Defendant had earlier removed his handgun from its case, and had brought it into the bedroom. He racked the weapon. Defendant pointed the loaded gun at the victim's head and then fired a shot that struck the telephone as the victim was trying to call the police. The victim ran downstairs and found another telephone, and defendant shot at her again as she was opening the front door, possibly grazing her ear. Four bullets remained in defendant's gun, and he hid four additional live rounds in a couch. Defendant thereafter told Doughty that he thought he had killed the victim by shooting her in the head. Defendant later expressed a continuing desire to kill the victim, and discussed various ways of doing so.

Viewed in the light most favorable to the prosecution, the evidence was sufficient to enable the jury to find beyond a reasonable doubt that defendant shot at the victim with a specific intent to kill her.

Defendant next argues that the trial court erred by failing to declare a mistrial after the victim allegedly reacted emotionally during the playing of the victim's 911 call. We disagree.

Because defendant did not move for a mistrial, we review this issue for plain error affecting defendant's substantial rights. *Carines*, *supra* at 763. "A mistrial should be granted only for an irregularity that is prejudicial to the rights of the defendant and impairs his ability to get a fair trial." *People v Rodgers*, 248 Mich App 702, 714; 645 NW2d 294 (2001).

The 911 recording was played for the jury by stipulation. At that time, no record was made of defendant's request to excuse the victim, or of the victim's alleged emotional reaction to hearing the tape. Before closing arguments, defense counsel made a record stating that the trial court had declined his request to excuse the victim from the courtroom, and that she had reacted emotionally during the call. However, there was no discussion concerning the severity of the victim's reaction. On this record, there is no basis for this Court to conclude that the victim's

alleged outburst was "so egregious" that its prejudicial effect could not have been cured by an appropriate instruction. See *People v Bauder*, 269 Mich App 174, 195; 712 NW2d 506 (2005). Thus, a plain error has not been shown. Furthermore, the record discloses that the trial court later instructed the jury not to allow sympathy to enter into its decision. Jurors are presumed to follow their instructions. See *People v Graves*, 458 Mich 476, 486; 581 NW2d 221 (1998). Because there has been no showing that the jury was not capable of following the court's instruction, defendant's substantial rights were not affected.

Defendant next argues that the trial court erroneously admitted defendant's post-offense statements to Doughty in which he expressed a continued desire to kill the victim. A trial court's decision to admit or exclude evidence is reviewed for an abuse of discretion. *People v Smith*, 456 Mich 543, 550; 581 NW2d 654 (1998). Defendant's statements were relevant to both a determination of consciousness of guilt, *People v Sholl*, 453 Mich 730, 740; 556 NW2d 851 (1996), and defendant's intent at the time of the offense. MRE 401; see also *Anderson*, *supra* at 537. It was for the jury to determine the meaning and significance of the statements. *Sholl*, *supra* at 740. Whether Doughty believed the threats was merely a factor for the jury to consider, not a basis for excluding the evidence. Therefore, the trial court did not abuse its discretion in admitting the statements.

Next, defendant argues that the trial court erroneously scored offense variables 6, 7, and 10 of the sentencing guidelines.

Application of the legislative sentencing guidelines is a question of law to be reviewed de novo on appeal. *People v Libbett*, 251 Mich App 353, 365; 650 NW2d 407 (2002). "A sentencing court has discretion in determining the number of points to be scored, provided that evidence of record adequately supports a particular score." *People v Hornsby*, 251 Mich App 462, 468; 650 NW2d 700 (2002).

MCL 777.36(1) instructs the sentencing court to score OV 6 at 50 points for a premeditated intent to kill, and 25 points for an unpremeditated intent to kill. "To premeditate is to think about beforehand; to deliberate is to measure and evaluate the major facets of a choice or a problem." *People v Furman*, 158 Mich App 302, 308; 404 NW2d 246 (1987). "While the minimum length of time needed to exercise this process is incapable of exact determination, a sufficient interval between the initial thought and the ultimate action should be long enough to afford a reasonable [person] an opportunity to take a second look at his contemplated actions." *Id*. Premeditation may be inferred from all the facts and circumstances, including the relationship between the parties, the circumstances of the offense, and the defendant's conduct before and after the crime. *Id*. Premeditation can also be inferred from the type of weapon used. *People v Berry (On Remand)*, 198 Mich App 123, 128; 497 NW2d 202 (1993).

In this case, defendant brought a loaded semi-automatic handgun into the bedroom, aimed it at the victim's head and argued with her before firing a shot. He racked the gun and followed the victim downstairs. She found a telephone and was on her way out the door when defendant shot at her a second time. Defendant told Doughty that he had shot the victim in the head and killed her, and then later expressed a continuing desire to kill her, and discussed various ways of doing so. This evidence was sufficient to support the trial court's score of 50 points for OV 6.

The trial court scored OV 7, aggravated physical abuse, at 50 points because defendant chased the victim out of the house into the cold at night, wearing only a T-shirt and underwear. The trial court did not specify what element of OV 7 it believed defendant's conduct established. Presumably, the court believed that it satisfied the definitions of either sadism or terrorism. We conclude, however, that such evidence does not satisfy the definition of terrorism, because it was not designed to "substantially increase" the fear and anxiety the victim suffered during the offense. *Hornsby*, *supra* at 468. Similarly, the definition of sadism is not satisfied because, while it may have been humiliating for the victim to flee from the house in a T-shirt and underwear, defendant's conduct was not calculated to subject the victim to "extreme or prolonged . . . humiliation," and further, defendant's conduct was not calculated to produce suffering, or intended for his own gratification. MCL 777.37(3). Therefore, the trial court erred in scoring 50 points for OV 7.

Lastly, five points may be scored for OV 10 if the defendant exploits a vulnerable victim because of a difference in size or strength. MCL 777.40(1)(c). "Exploit" means to "manipulate a victim for selfish or unethical purposes." MCL 777.40(3)(b). "Vulnerability" means "the readily apparent susceptibility of a victim to injury, physical restraint, persuasion, or temptation." MCL 777.40(3)(c). However, as subsection (2) warns, the mere existence of a difference in size or strength, "does not automatically equate with victim vulnerability."

In the present case, while defendant does not dispute the physical difference in size and strength between himself and the victim, the evidence does not show that defendant "manipulated" the victim, or that the victim's "readily apparent susceptibility to injury, physical restraint, persuasion, or temptation" was a factor in the commission of the offense. Rather, the offense was accomplished through the use of a weapon, and was committed because of defendant's belief that the victim was having an affair. Under the circumstances, we conclude that OV 10 should have been scored at 0.

If offense variables 7 and 10 were both scored at zero points, defendant's total OV score would be reduced to 90 points, instead of 145 points as calculated by the trial court, placing him in offense variable level V instead of VI. See MCL 777.62. The resulting sentencing guidelines range would be 81 to 135 months, instead of 108 to 180 months. Although defendant's 120-month minimum sentence is within the corrected guidelines range, because the scoring errors affect the appropriate guidelines range, resentencing is required in order to afford the trial court an opportunity to alter defendant's sentence "in relationship to the correct guidelines range," if the current sentence does not conform to the trial court's original "intention." MCL 769.34(10); *People v Francisco*, 474 Mich 82, 91-92; 711 NW2d 44 (2006).

Defendant also raises several issues in a pro se supplemental brief, none of which have merit.

Defendant first argues that the prosecutor's conduct during closing argument deprived him of a fair trial. We disagree.

Claims of prosecutorial misconduct are reviewed on a case-by-case basis, and the challenged remarks are reviewed in context. *People v Noble*, 238 Mich App 647, 660; 608 NW2d 123 (1999). The test for prosecutorial misconduct is whether the defendant was deprived of a fair trial. *People v Bahoda*, 448 Mich 261, 266-267 and nn 5-7; 531 NW2d 659 (1995). In

this case, however, defendant did not object to any of the alleged misconduct. Therefore, defendant must show plain error affecting his substantial rights. *Carines*, *supra* at 763-764.

It is improper for a prosecutor to inject issues broader than a defendant's guilt or innocence. See *People v Rice (On Remand)*, 235 Mich App 429, 438; 597 NW2d 843 (1999). Although motive is not an element of assault with intent to commit murder, it is relevant to proving intent to kill, which is an element of the crime. *People v Herndon*, 246 Mich App 371, 412-413; 633 NW2d 376 (2001). The prosecutor's discussion of motive did not inject extraneous issues into the deliberations, and did not mislead or confuse the jury.

Defendant argues that the prosecutor improperly and repeatedly accused him of lying, without any evidentiary basis, and improperly vouched for the credibility of his own witnesses. As defendant argues, "[a] prosecutor may not vouch for the credibility of a witness, nor suggest that the government has some special knowledge that the witness is testifying truthfully." *People v Howard*, 226 Mich App 528, 548; 575 NW2d 16 (1997). "A prosecutor may, however, argue from the facts that a witness is credible or that the defendant or another witness is not worthy of belief." *Id*. In this case, the prosecutor's comments were based on CJI2d 2.6 (determining credibility), and were not improper. The prosecutor's comments concerning defendant's credibility, including remarks that defendant had lied to the jury, were based on the evidence—which the prosecutor referred to in his comments—that defendant had admittedly lied to the victim about his affair, and admittedly lied to the police about the shooting. The prosecutor properly argued that, in light of the evidence introduced at trial, including defendant's prior lies and the victim's testimony, the jury should conclude that defendant was also lying when he testified that he did not intend to kill the victim. Thus, the prosecutor's comments were proper.

Defendant also argues that the prosecutor improperly speculated what defendant may have said to himself after missing the first shot, without any evidentiary basis, and improperly expressed his personal sentiments. A prosecutor is free to comment on the evidence, to draw all reasonable inferences from the evidence, and to argue how the evidence relates to the prosecutor's theory of the case. *People v Marji*, 180 Mich App 525, 538; 447 NW2d 835 (1989), rem on other grounds sub nom *People v Thomas*, 439 Mich 896 (1991); see also *People v Cox*, 268 Mich App 440, 451; 709 NW2d 152 (2005). In this case, the prosecutor posited that, after the first shot, defendant may have been thinking, "Holy cow, what do I do now?" However, the prosecutor was properly relating the evidence—including the live round found by the police under the bed—to his theory of the case, i.e., that defendant twice shot at the victim with the intent to kill her. The prosecutor did not inject his personal sentiments into the case.

Defendant argues that there was no evidentiary support for the prosecutor's comment that defendant brought the gun into the bedroom on the night of the shooting, and that the prosecutor's argument improperly shifted the burden of proof. "A prosecutor may not argue the effect of testimony that was not entered into evidence at trial." *People v Stanaway*, 446 Mich 643, 686; 521 NW2d 557 (1994). Further, as argued by defendant, a prosecutor cannot undermine the presumption of innocence by suggesting that the defendant has an obligation to prove anything, because such an argument tends to shift the burden of proof. See *People v Fields*, 450 Mich 94, 115; 538 NW2d 356 (1995). However, "although a defendant has no burden to produce any evidence, once the defendant advances evidence or a theory, argument

with regard to the inferences created does not shift the burden of proof." *People v Godbold*, 230 Mich App 508, 521; 585 NW2d 13 (1998).

In the present case, the prosecutor did not imply that defendant had an obligation to prove anything, and did not argue facts not in evidence. Rather, drawing reasonable inferences from the available evidence, including the location of the gun and the gun case, as well as defendant's own testimony that the gun was in the closet, the prosecutor argued that defendant *most likely* brought the gun into the house on the night of the crime. The fact that a question was not specifically asked does not preclude the prosecutor from drawing reasonable inferences from the evidence admitted at trial, and using those inferences to prove his case.

Defendant argues that the prosecutor referred to facts not in evidence by speculating that defendant racked the gun before going downstairs. Once again, in arguing that defendant racked the gun after the first shot, before going downstairs, the prosecutor was properly relating the evidence to his theory of the case. On rebuttal, the prosecutor properly addressed defense counsel's argument that the prosecutor's theory concerning the live round under the bed was speculative. A prosecutor can respond to a defendant's closing argument. *People v Watson*, 245 Mich App 572, 592-593; 629 NW2d 411 (2001). Further, the prosecutor was not required to phrase his argument in the blandest possible terms—after all, the prosecutor is an advocate and has not only the right, but also the duty, to advocate his case vigorously. *Marji*, *supra* at 538; see also *Cox*, *supra* at 451. Here, the prosecutor's comments were fair, and did not deprive defendant of a fair trial.

Defendant argues that there was no evidentiary support for the prosecutor's comment that the victim did not ask defendant to get his gun and shoot her. The comment was, again, a reasonable inference based on the evidence. It was also a reasonable response to defendant's closing argument. The prosecutor did not refer to facts not in evidence.

Defendant also argues that there was no evidentiary basis for the prosecutor's argument that the second shot grazed the victim's ear. This was also a proper comment on the evidence and the parties' theories of the case. While the medical evidence indicated that the source of the victim's injury could not be determined with certainty, the prosecutor was free to draw reasonable inferences from the evidence as a whole, and to use those inferences to argue his case to the jury.

Defendant argues that the prosecutor shifted the burden of proof by arguing that defendant shot at the victim's head because he intended to kill her, and that the prosecutor's question and answer technique confused the jury. Once again, the prosecutor did not shift the burden of proof to defendant. Rather, the challenged comment, that defendant aimed at the victim's head because he intended to kill her, was a reasonable inference drawn from the victim's testimony that defendant pointed the gun at her head. Additionally, there is no record support for defendant's argument that the prosecutor's question and answer technique was confusing.

Defendant again asserts that, on rebuttal, the prosecutor shifted the burden of proof by arguing that defendant intended to kill the victim, and lied about it to the jury. Contrary to defendant's argument, the prosecutor did not suggest that defendant had an obligation to prove anything, and did not refer to facts not in evidence. Rather, the prosecutor was addressing

defense counsel's argument that the prosecution's case was based on the parties' divorce. The prosecutor stated that his theory of the case was that defendant intended to kill the victim, and properly reminded the jury that motive is not an element of the crime.

Lastly, defendant argues that, on rebuttal, the prosecutor improperly vouched for the credibility of his witnesses, improperly interjected his personal knowledge and beliefs about the case, and improperly placed the prestige of the prosecutor's office (and the prestige of the police) behind the prosecution's witnesses. Clearly, a "prosecutor may not to place the prestige of his office behind the assertion that the defendant is guilty, [although] he may argue that the evidence establishes [the] defendant's guilt." *People v Swartz*, 171 Mich App 364, 370; 429 NW2d 905 (1988). As previously indicated, a prosecutor may not vouch for the credibility of a witness, but he may argue from the facts that a witness is credible. *Howard*, *supra* at 548. Additionally, the "prosecutor's comments must be considered in light of the defenses counsel's comments." *Watson*, *supra* at 592-593.

In this case, defense counsel pointed out what he perceived as inadequacies in the prosecution's case. The prosecutor was entitled to respond. The prosecutor did not vouch for the credibility of his witnesses, he did not inject his personal beliefs into the proceedings, and he did not place the prestige of his office or of the police behind the prosecution's witnesses. Rather, the prosecutor responded that a lot of evidence was produced at trial for such an allegedly incompetent group. Additionally, the prosecutor argued, based on the evidence, including defendant's own testimony of where he was standing when each shot was fired, that police testimony concerning bullet trajectories was worthy of belief.

For these reasons, we reject this claim of error. Defendant has failed to establish that any of the prosecutor's conduct was improper, let alone constituted plain error.

Next, defendant argues that his statement to the police was taken in violation of his right to counsel, and should have been suppressed. We disagree. Because defendant did not move to suppress his statement below, or object to the evidence of his statement at trial, this issue is unpreserved. Our review is for plain error affecting defendant's substantial rights. *Carines*, *supra* at 763.

On appeal, defendant has submitted an affidavit from Doughty in which she avers that defendant requested an attorney upon being arrested, but the police refused to allow him to speak to one. However, the affidavit does not address whether, after being told that the attorney would meet him at the jail, defendant nonetheless agreed to speak to the police.

When a statement is obtained in violation of a defendant's right to counsel, the prosecution is prohibited from using the statement in its case-in-chief. *People v Frazier*, 270 Mich App 172, 179; 715 NW2d 341 (2006), rev'd in part on other grounds 478 Mich 231 (2007). In the present case, although a witness referred to defendant's statement during the prosecutor's case-in-chief, the content of the statement did not tend to incriminate defendant. Rather, the arresting officer testified that defendant denied any knowledge of the crime. Therefore, any error did not affect defendant's substantial rights.

The statement was also used to impeach defendant. It is well settled that, "if otherwise voluntary," a statement taken in violation of a defendant's right to counsel is "admissible for

impeachment purposes."[3] *Frazier*, *supra* at 180-181. In other words, a defendant cannot use the illegal method by which a statement is allegedly obtained as "a shield against contradiction of his untruths" at trial. *Id.*, quoting *Walder v United States*, 347 US 62, 65; 74 S Ct 354; 98 L Ed 2d 503 (1954); see also *Michigan v Harvey*, 494 US 344, 351; 110 S Ct 1176; 108 L Ed 2d 293 (1990); *Harris v New York*, 401 US 222, 225-226; 91 S Ct 643; 28 L Ed 2d 1 (1971). Thus, use of the statement for impeachment purposes was not plain error.

Next, defendant argues that the trial court erred in instructing the jury that he had been charged with more than one offense, and in instructing the jury to determine whether a handgun is a deadly weapon.

At trial, in explaining what constitutes evidence, the trial court instructed the jury "the fact that [defendant] is charged with more than one crime is not evidence." The court later realized its misstatement and offered to correct its mistake, but defense counsel declined a curative instruction. Defense counsel's express decision to forego a curative instruction waived any error. *People v Riley*, 465 Mich 442, 449; 636 NW2d 514 (2001); see also *People v Carter*, 462 Mich 206, 215-220; 612 NW2d 144 (2000).

In its instructions concerning the elements of assault with intent to do great bodily harm less than murder, the court read former CJI2d 3.9 (specific intent)[4] and CJI2d 17.10 (definition of a dangerous weapon). Defendant only challenges the definition of a dangerous weapon.

Intent to cause great bodily harm—like intent to kill—can be inferred from the use of a deadly weapon. See *People v Harrington*, 194 Mich App 424, 429-430; 487 NW2d 479 (1992). In this case, it is undisputed that defendant used a handgun. Thus, it was proper to instruct the jury that if it concluded that defendant's handgun was a dangerous weapon, it could use that finding to infer that defendant acted with intent to do great bodily harm. Viewed as a whole, the instruction fairly apprised the jury of the issues to be tried and sufficiently protected defendant's rights. *People v Gaydosh*, 203 Mich App 235, 237; 512 NW2d 65 (1994). There was no plain error.

Defendant next argues that defense counsel committed several mistakes at trial, depriving him of the effective assistance of counsel. Because no *Ginther*[5] hearing was held, our review of this issue is limited to mistakes apparent on the record. See *People v Hurst*, 205 Mich App 634, 641; 517 NW2d 858 (1994).

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[3] Defendant does not argue that the statement was involuntary.

[4] The committee notes indicate that CJI2d 3.9 was deleted in May 2005, in response to comments by our Supreme Court in *People v Maynor*, 470 Mich 289, 296-297; 683 NW2d 565 (2004), that the instruction was unnecessary in light of the virtual abolition of voluntary intoxication as a defense. On appeal, defendant does not challenge the trial court's instruction based on former CJI2d 3.9.

[5] *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973).

To establish ineffective assistance of counsel, defendant must show that counsel's performance was deficient and that, under an objective standard of reasonableness, counsel made an error so serious that he was not performing as the attorney guaranteed by the constitution. *People v Pickens*, 446 Mich 298, 302-303; 521 NW2d 797 (1994). Defendant must overcome the presumption that the challenged conduct might be considered sound trial strategy and must further show that he was prejudiced by the error in question. *Id*. at 312, 314. That is, defendant must show a reasonable probability that the error may have made a difference in the outcome of the trial. *People v LaVearn*, 448 Mich 207, 216; 528 NW2d 721 (1995); *Pickens*, *supra* at 312, 314. Where counsel's conduct involves a choice of strategies, it is not deficient. *LaVearn*, *supra* at 216.

Defendant argues that counsel was ineffective for failing to meet with him before trial. Failure to reasonably investigate a case can constitute ineffective assistance of counsel. *People v McGhee*, 268 Mich App 600, 626; 709 NW2d 595 (2005). Although defendant asserts that he did not have an opportunity to meet with defense counsel until trial, defendant makes no effort to explain how he was prejudiced by counsel's failure to meet with him earlier, or how an earlier meeting could have benefited his case. Absent a showing of prejudice, this claim of ineffective assistance of counsel must fail.

Defendant also argues that counsel was ineffective for not investigating the operability of the gun, and for failing to interview Doughty. There is no record support for defendant's claim that defense counsel failed to investigate the gun issue. Nor is there any record support for defendant's theory that the gun may have fired bullets erratically. Indeed, if that were the case, counsel may have wanted to avoid presenting such evidence as a matter of trial strategy, to prevent the prosecution from arguing that defendant intentionally fired the gun at the victim, but missed only because the bullets did not fire accurately.

Similarly, there is no record support for defendant's claim that defense counsel failed to interview Doughty. Furthermore, failing to interview a witness does not necessarily constitute ineffective assistance. *People v Caballero*, 184 Mich App 636, 642; 459 NW2d 80 (1990). In order to overcome the presumption of sound trial strategy, defendant must show that counsel's alleged error may have made a difference in the outcome by, for example, depriving defendant of a substantial defense. See *People v Flowers*, 222 Mich App 732, 737; 565 NW2d 12 (1997); see also *People v Daniel*, 207 Mich App 47, 58; 523 NW2d 830 (1994).

Defendant has submitted an affidavit from Doughty in which she avers that she was threatened with perjury charges if she did not cooperate with the police. However, Doughty does not aver that any of her trial testimony was false. Defendant has not shown that any alleged failure to interview Doughty affected the outcome of trial or deprived defendant of a substantial defense. See *People v Dixon*, 263 Mich App 393, 398; 688 NW2d 308 (2004).

Defendant also argues that defense counsel was ineffective for failing to interview and subpoena Anthony Simmons. Defendant asserts that Simmons would have testified that when he was with defendant earlier in the evening, defendant did not intend to kill his wife. Once again, there is no record support for defendant's claim that defense counsel failed to interview this witness, or for defendant's claim that the witness would have testified in the manner defendant claims. More importantly, the witness was not present during the shooting and would not be able to testify concerning defendant's intent at the time of the shooting. Accordingly, there is no

reasonable possibility that Simmons's testimony might have made a difference in the outcome of defendant's trial.

Defendant also argues that counsel was ineffective for failing to object to the prosecutor's conduct during closing argument, and to the trial court's jury instructions, as discussed earlier in this opinion. As previously discussed, the prosecutor's conduct was not improper. Therefore, counsel was not ineffective for failing to object. An attorney is not required to make a futile objection. See *People v Kulpinski*, 243 Mich App 8, 27; 620 NW2d 537 (2000). The court's misstatement that defendant was charged with more than one crime was not serious or prejudicial, and defendant has failed to overcome the presumption that counsel made a sound strategy decision by declining the court's offer to correct the misstatement, to avoid calling attention to the issue. Further, because the trial court did not err in instructing the jury on the definition of a dangerous weapon, counsel was not ineffective for failing to object to the instruction.

Next, defendant argues that counsel was ineffective for failing to move to suppress defendant's statements, allegedly taken in violation of defendant's right to counsel. As previously discussed, however, the brief reference to defendant's statement in the prosecutor's case-in-chief was not prejudicial, and the statement was properly used for impeachment. Therefore, counsel was not ineffective for failing to object.

Defendant argues that defense counsel was ineffective for failing to inform him that he had previously represented Doughty, which defendant alleges led to a conflict of interest. There is no record support for defendant's claim that counsel failed to disclose that he had previously represented Doughty. Moreover, defendant does not explain how the alleged representation led to an actual conflict of interest that affected counsel's representation of defendant. Therefore, defendant has failed to show a serious error resulting in prejudice.

Lastly, defendant argues that defense counsel was ineffective for failing to move for a mistrial, and in failing to move for a directed verdict. As discussed previously, there is no merit to defendant's claim that he was entitled to a mistrial. Similarly, because there was a question of fact whether defendant assaulted the victim with an intent to kill, defendant was not entitled to a directed verdict. Therefore, counsel was not ineffective for failing to request a mistrial or move for a directed verdict.

Next, defendant argues that the jury's verdict is against the great weight of the evidence. We disagree. Because defendant did not raise this issue in an appropriate motion before the trial court, the issue is not preserved and our review is limited to plain error affecting substantial rights. *Carines, supra* at 763; *People v Bradshaw*, 165 Mich App 562, 565; 419 NW2d 33 (1988).

A new trial may be granted where the verdict is against the great weight of the evidence, but "only where the evidence preponderates heavily against the verdict and a serious miscarriage of justice would otherwise result." *People v Lemmon*, 456 Mich 625, 642; 576 NW2d 129 (1998). "[A]bsent exceptional circumstances, issues of witness credibility are for the jury, and the trial court may not substitute its view of credibility 'for the constitutionally guaranteed jury determination thereof.'" *Id*. (citation omitted). In this case, there was ample evidence to support the jury's verdict. The verdict is not against the great weight of the evidence.

Next, defendant argues that the prosecutor's misconduct, the trial court's instructional errors, and the erroneous admission of Doughty's testimony concerning defendant's statements, combined to deprive him of a fair trial. We have previously addressed, and rejected, each of these issues. Therefore, the cumulative effect of these matters did not deny defendant a fair trial or justify a mistrial. See *People v Daoust*, 228 Mich App 1, 16; 577 NW2d 179 (1998); see also *People v Morris*, 139 Mich App 550, 563; 362 NW2d 830 (1984).

Affirmed in part and remanded for resentencing. We do not retain jurisdiction.

/s/ William C. Whitbeck
/s/ Michael J. Talbot
/s/ Brian K. Zahra

APPENDIX C

STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant,

v

CHRISTOPH FREDERICK VANDERLEEK,

Defendant-Appellee.

UNPUBLISHED
November 6, 2008

No. 282989
Alpena Circuit Court
LC No. 07-001520-FH

Before: Beckering, P.J., and Borrello and Davis, JJ.

MEMORANDUM.

Plaintiff appeals as of right, challenging defendant's prison sentence of 26 months to 15 years for first-degree child abuse, MCL 750.136b(2). We affirm. This case has been decided without oral argument pursuant to MCR 7.214(E).

"This Court reviews a sentencing court's scoring decision to determine whether the trial court properly exercised its discretion and whether the record evidence adequately supports a particular score." *People v McLaughlin*, 258 Mich App 635, 671; 672 NW2d 860 (2003). Questions of statutory interpretation are reviewed de novo. *Dressel v Ameribank*, 468 Mich 557, 561; 664 NW2d 151 (2003). Further, "[a] scoring decision will be upheld if there is any evidence to support it." *People v Kegler*, 268 Mich App 187, 190; 706 NW2d 744 (2005).

Plaintiff argues that the trial court erred in scoring offensive variable 7 (OV 7) at zero points, instead of 50 points, because the evidence showed that defendant had treated the three-month-old victim with excessive brutality. There are only two possible scores for OV 7—zero points or 50 points. *People v Cline*, 276 Mich App 634, 652; 741 NW2d 563 (2007). Fifty points should be given if the "victim was treated with sadism, torture, or excessive brutality or conduct designed to substantially increase the fear and anxiety a victim suffered during the offense." MCL 777.37(1)(a). Zero points should be given if the victim was not "treated with sadism, torture, or excessive brutality or conduct designed to substantially increase the fear and anxiety a victim suffered during the offense." MCL 777.37(1)(b). While the statute defines "sadism," the statute does not define "excessive brutality."

The trial court did not abuse its discretion in scoring zero points for OV 7 because it was reasonable for the court to find there was not *excessive* brutality. The evidence on the partial record showed the victim had bruises around her eyes, under her chin, on her lower back, on the front of her legs, below her knees, and on her left arm. The victim also had a broken femur,

acute and/or subacute subdural hematoma, and may have had broken ribs. While defendant claims that the head injury was caused when he tripped while holding the baby, he did admit to causing bruises and the possible rib injury when squeezing the baby in trying to quiet it from crying and fussing, and causing the leg injury when he "reefed" the baby's leg in frustration after a changing table broke. First-degree child abuse is defined as "the person knowingly or intentionally caus[ing] serious physical or serious mental harm to a child." MCL 750.136b(2). It can fairly be said that any crime against a child is necessarily brutal; however, that would mean that any time a child is the victim of child abuse, OV 7 must be scored at 50 points. Against this background, it was reasonable for the trial court to effectively conclude that only conduct at the far end of the spectrum of first-degree child abuse should be considered "excessively brutal" for purposes of OV 7.

Affirmed.

/s/ Jane M. Beckering
/s/ Stephen L. Borrello
/s/ Alton T. Davis

APPENDIX D

4/5

SENTENCING INFORMATION REPORT

Offender: URBAN, James David **SSN:** 367-66-2275 **Workload:** 3378 **Docket Number:** 15020176-FH

Judge: The Honorable Janice K. Cunningham **Bar No.:** P38700 **Circuit No.:** 56 **County:** 23

Conviction Information

Conviction PACC: 750.349B **Offense Title:** Unlawful Imprisonment

Crime Group: Person **Offense Date:** 05/28/2015

Crime Class: Class C **Conviction Count:** 1 of 3 **Scored as of:** 05/28/2015

Statutory Max: 180 **Habitual:** No **Attempted:** No

Prior Record Variable Score

PRV1: 0 **PRV2:** 0 **PRV3:** 0 **PRV4:** 0 **PRV5:** 0 **PRV6:** 0 **PRV7:** 10

Total PRV: 10

PRV Level: C

Offense Variable

OV1: 15 **OV2:** 5 **OV3:** ~~10~~ 5 **OV4:** 10 **OV5:** 0 **OV6:** 0 **OV7:** 50

OV8: 0 **OV9:** 0 **OV10:** ~~10~~ 0 **OV11:** 0 **OV12:** 0 **OV13:** 0 **OV14:** 0

OV16: 0 **OV17:** 0 **OV18:** 0 **OV19:** 0 **OV20:** 0

Total OV: ~~100~~ 85

OV Level: VI

Sentencing Guideline Range

Guideline Minimum Range : 43 to 86

Minimum Sentence

	Months	Life
Probation:		☐
Jail:		
Prison:		☐

Sentence Date:

Guideline Departure:

Consecutive Sentence:

Concurrent Sentence: Yes

Sentencing Judge: [signature]

Date: 4/1/16

Prepared By: VANORDER, SCOTT M